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RIGHTS AND RESPONSIBILITIES IN ADMINISTRATIVE RULE MAKING IN WEST VIRGINIA†

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I. INTRODUCTION

In 1976 the West Virginia Legislature amended the West Virginia Administrative Procedure Act for the first time since its passage in 1964.¹ The 1976 Amendments are significant in their impact on the manner in which state agencies must develop and adopt administrative rules and regulations. One noteworthy feature of the new law is the provision for establishment of a state register for routine publication of administrative rules and regulations in proposed as well as final form.² Equally important are the new provisions for formal legislative review of administrative rules.³ A Legislative Rule-making Review Committee has been created within the Legislature with primary responsibility in the first instance for approval of agency rules.⁴ Its potential influence on rule making in the State is considerable.

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¹ Acts of the 62nd W. Va. Leg; ch. 117, Reg. Sess. (1976), *amending and reenacting* W. VA. CODE ANN. §§ 29A-3-1 to -7 (1976 Replacement Vol.) [originally enacted as Acts of the 56th W. Va. Leg. ch. 1, §§ 29A-3-1 to -7, Reg. Sess. (1964)] (*codified at* W. VA. CODE ANN. §§ 29A-3-1 to -15 (1976 Replacement Vol.)) [hereinafter referred to as the 1976 Amendments]. Other articles in the original enactment have not been amended (*codified at* W. VA. CODE ANN. §§ 29A-1-1 to -2-2, -4-1 to -7-4 (1976 Replacement Vol.)) These articles, including article three, as originally enacted, hereinafter are referred to as the 1964 Act.

² W. VA. CODE ANN. §§ 29A-3-4, -7, -10 (1976 Replacement Vol.).

³ W. VA. CODE ANN. §§ 29A-3-10, -11 (1976 Replacement Vol.).

⁴ W. VA. CODE ANN. § 29A-3-10 (1976 Replacement Vol.).

Both the recent amendments and, to a lesser extent, the 1964 Administrative Procedure Act itself reflect an unambiguous legislative commitment to effective public participation in administrative rule-making. The Legislature's objective in this regard has been to insure that West Virginia administrative agencies not be permitted the luxury of conducting their rule-making activities insulated from public sentiment and views. To that end the Legislature has made available to the public and to the Legislature itself various opportunities for control of agency rulemaking through participation in the process by which rules and regulations are promulgated.

The 1976 Amendments are not unprecedented; they are consistent with widely accepted principles and policies of administrative law. Many states provide for centralized publication of administrative rules and regulations,⁵ often under the auspices of the Secretary of State. This was the case in West Virginia as early as 1964.⁶ There is considerable variation in requirements concerning the frequency of publication, but a number of states provide for frequent publication or supplementation on a routine basis comparable to that now prescribed for the West Virginia state register.⁷

⁵ ALASKA STAT. §§ 44.62.130, .140, .160 (1962); CAL. STATE GOV'T. CODE ANN. § 11409 (Supp. 1977); COLO. REV. STAT. § 24-4-103 (11) (1973); CONN. GEN. STAT. ANN. § 4-173 (Supp. 1977); FLA. STAT. ANN. § 120.55 (Supp. 1977); GA. CODE ANN. § 3A-107 (1975); IND. ANN. CODE §§ 4-22-2-7 to -9 (1974); IOWA CODE ANN. § 17A.6 (Supp. 1977); KAN. STAT. §§ 77-427, -430 (Supp. 1976); KY. REV. STAT. § 13.096 (Supp. 1976); LA. REV. STAT. § 49:954.1 (Supp. 1977); ME. REV. STAT. tit. 5, § 2353 (1964); MD. ANN. CODE. art.41, § 256C (Supp. 1976); MASS. ANN. LAWS ch. 30A, § 6 (1973); MICH. STAT. ANN. § 3.560 (146) (Supp. 1977); MINN. STAT. ANN. § 15.051 (1977); MISS. CODE ANN. § 25-43-11 (Supp. 1977); MO. ANN. STAT. § 536.031 (Supp. 1977); MONT. REV. CODES ANN. § 82-4206 (Supp. 1975); N. H. REV. STAT. ANN. § 541-A:5 (Supp. 1973); N.J. STAT. ANN. § 52: 14B-7 (Supp. 1976); N.M. STAT. ANN. § 4-32-6 (1974); N.Y. EXEC. LAWS § 160 (McKinney Supp. 1975); N.C. GEN. STAT. § 150A-63 (Supp. 1975); OKLA. STAT. ANN. tit. 75, §§ 255, 256 (1976); OR. REV. STAT. § 183.360 (1975); PA. STAT. ANN. tit. 45, §§ 701-702 (Special Pamphlet 1977); R.I. GEN. LAWS § 42-35-5 (1969); S.C. CODE §§ 1-16, -17 (1962); S.D. COMPILED LAWS ANN. § 1-26A-1 (Supp. 1977); TENN. CODE ANN. § 4-502 (Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 6 (Supp. 1976); UTAH CODE ANN. § 63-46-7 (Supp. 1977); VT. STAT. ANN. tit 3, §§ 804, 805 (Supp. 1977); VA. CODE § 9-6.19 (Supp. 1976); WASH. REV. CODE § 34.04.050 (1967); WIS. STAT. ANN. § 35.93 (West Supp. 1977); WYO. STAT. § 9-276.23 (Supp. 1975). The laws of the District of Columbia and Puerto Rico have similar provisions. D.C. CODE ANN. §§ 1-1504, 1507, 1602 (Supp. III 1976); P.R. LAWS ANN. tit. 3, § 1054 (1965).

⁶ Acts of the 56th W. Va. Leg. ch. 1, § 29A-3-7, Reg. Sess. (1964).

⁷ CONN. GEN. STAT. ANN. § 4-173 (Supp. 1976); FLA. STAT. ANN. §§ 120.54, .55 (Supp. 1976); IOWA CODE ANN. § 17A.6 (Supp. 1976); KY. REV. STAT. ANN. § 13.096

Furthermore, many states require publication of proposed as well as final agency rules in the central register.⁸ At the national level, the Federal Register, now in its fifth decade, provides comparable information from a single source.⁹ Likewise, legislative review is not uncommon. Over twenty states now have statutes providing for some form of formal legislative review of agency rule making which goes beyond the traditional legislative techniques for control of administrative action.¹⁰ It is clear, therefore, that the need for

(Supp. 1976); LA. REV. STAT. § 49: 954.1 (Supp. 1976); MD. ANN. CODE art. 41, § 256C (Supp. 1976); MASS. GEN. LAWS ANN. ch. 30A, § 6 (1973); MICH. STAT. ANN. § 3.560 (155,156) (Supp. 1977); MINN. STAT. ANN. § 15.051 (West 1977 Replacement Vol.); MO. ANN. STAT. § 536.015 (Supp. 1976); MONT. REV. CODES ANN. § 82-4206 (Supp. 1975); N.J. STAT. ANN. § 52: 14B-7 (Supp. 1976); N.M. STAT. ANN. § 4-32-6 (1974); N.Y. EXEC. § 160 (McKinney Supp. 1976); OKLA. STAT. ANN. tit. 75, § 255 (1976); OR. REV. STAT. § 183.360 (1975); PA. STAT. ANN. tit. 45, § 724 (Special Pamphlet 1977); TENN. CODE ANN. §§ 4-502, 510 (Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 6 (Supp. 1976); UTAH CODE ANN. § 63-46-7 (Supp. 1977); WASH. REV. CODE ANN. § 34.04.050 (1965); WIS. STAT. ANN. § 35.93 (Supp. 1977). *See also* D.C. CODE ANN. § 1-1504 (Supp. III 1976); P.R. LAWS ANN. §§ 1053, 1054 (1965).

⁸ CAL. GOV'T CODE § 11409 (Supp. 1976); COLO. REV. STAT. ANN. § 24-4-103 (3) (1973); CONN. GEN. STAT. ANN. § 4-168 (Supp. 1976); FLA. STAT. ANN. § 120.54 (1) (Supp. 1976); ILL. ANN. STAT. ch. 27, § 1007 (Smith-Hurd Supp. 1977) requires the Secretary of State to maintain a weekly bulletin service for notice of proposed rule making, even though the responsibility for publication of final rules rests with the agencies. ILL. ANN. STAT. ch. 127, § 1007 (Smith-Hurd Supp. 1977); IOWA CODE ANN. § 17A.5 (Supp. 1976); KY. REV. STAT. ANN. § 13.085 (Supp. 1976); LA. REV. STAT. ANN. § 49:953 (Supp. 1976); MD. ANN. CODE art. 41, § 245 (Supp. 1976); MINN. STAT. ANN. § 15.0412 (Replacement Vol. 1976); MO. ANN. STAT. § 5 536.021 (Supp. 1976); MONT. REV. CODES ANN. § 82-4204 (Supp. 1975); N.J. STAT. ANN. § 52:14B-4 (1970); OKLA. STAT. ANN. tit. 75, § 303 (1976); OR. REV. STAT. § 183.335 (1975); PA. STAT. ANN. tit. 45, § 724-725 (Special Pamphlet 1977); S.D. COMPILED LAWS ANN. § 1-26-4.1 (Supp. 1977); TENN. CODE ANN. § 4-530 (Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 5 (Supp. 1976); UTAH CODE ANN. §§ 63-46-5, -7 (Supp. 1977); WIS. STAT. ANN. § 227-021 (West 1957); *See also* D.C. CODE ANN. § 1-1505 (Supp. III 1976).

⁹ 44 U.S.C. §§ 1501-1511 (1970) (originally enacted as Act of July 26, 1935, ch. 417, 49 Stat. 500).

¹⁰ ALASKA STAT. § 44.62.320 (1962); ARK. STAT. ANN. §§ 6-610 to -612 (1976); CONN. GEN. STAT. ANN. § 4-170, -171 (Supp. 1976); FLA. STAT. ANN. §§ 11.60, 120.54 (Supp. 1976); IDAHO CODE §§ 67-5217, 5218 (Supp. 1977); IOWA CODE ANN. §§ 17A.4 (4), .8 (Supp. 1976); KAN. STAT. § 77-426 (Supp. 1976); KY. REV. STAT. ANN. §§ 13.085, .087 (Supp. 1976); MD. ANN. CODE art. 40, § 40A (Supp. 1976); MICH. STAT. ANN. §§ 3.560 (135), (145) (Supp. 1977); MINN. STAT. ANN. § 3.965 (1976 Replacement Vol.); MO. ANN. STAT. § 536.037 (Supp. 1976); MONT. REV. CODES ANN. § 82.4203.1-.5 (Supp. 1975); NEB. REV. STAT. §§ 84-904, -908 (Cum. Supp. 1976); OKLA. STAT. ANN. tit. 75, § 308 (1976); OR. REV. STAT. §§ 171.707-.713 (1975); S.D. COMPILED LAWS ANN. § 1-26-1.1 (Supp. 1977); VT. STAT. ANN. tit. 3, §§ 817-819

public participation and legislative control in administrative rule making has been recognized and met in similar ways elsewhere.

Legislative activity at the state and federal levels concerning the way in which administrative agencies are to conduct their affairs is but one manifestation of a phenomenon which has attracted the attention of many in this century, and for good reason. Twenty-five years ago Mr. Justice Jackson observed, "The rise of administrative bodies probably has been the most significant legal trend of the last century and perhaps more values today are affected by their decisions than by those of all the courts, review of administrative decisions apart."¹¹ This trend has not developed without criticism, and on occasion courts have found that the delegation of law-making and policy tasks to administrative bodies has exceeded constitutional boundaries.¹² The exigencies of government in an increasingly complex society, however, have supported and, indeed, required growth in the technique of policy and decision making through administrative bodies.¹³ In West Virginia, the propriety of delegation of authority to administrative agencies has been recognized for some time,¹⁴ subject to the caveat that the administrator must act within his delegated powers.¹⁵ The result has been extensive reliance in West Virginia, as elsewhere, on the

(Supp. 1977); WASH. REV. CODE ANN. § 34.04.160 (1965); WIS. STAT. ANN. §§ 13.56, .565 (Supp. 1976); see Note, *A Survey of Principal Procedural Elements Among State Administrative Procedure Acts*, 22 CLEV. ST. L. REV. 281, 285-87 (1973).

¹¹ *FTC v. Ruberoid Co.*, 343 U.S. 470, 487 (1952) (Jackson, J., dissenting).

¹² *Schechter Poultry Corp. v. United States*, 295 U.S. 495 (1935); See *Panama Refining Co. v. Ryan*, 293 U.S. 388 (1935). These, however, have been the only cases in which a congressional delegation of power has been declared unconstitutional by the Supreme Court. Subsequent cases have upheld broad delegations of authority to administrative agencies. B. SCHWARTZ, *ADMINISTRATIVE LAW* 39-47 (1976) [hereinafter cited as SCHWARTZ].

¹³ See Schwartz, *The Administrative Process and Congressional Control*, 16 FED. B. J. 519, 520-21 (1956).

¹⁴ *State ex rel. West Virginia Housing Dev. Fund v. Copenhaver*, 153 W. Va. 636, 649-51, 171 S.E.2d 545, 553 (1969); *Quesenberry v. Estep*, 142 W. Va. 426, 441-45, 95 S.E.2d 832, 841-44 (1956); see *Meisel v. Tri-State Airport Authority*, 135 W. Va. 528, 545, 64 S.E.2d 32, 41-42 (1951); *Frampton v. Consolidated Bus Lines, Inc.*, 134 W. Va. 815, 829, 62 S.E.2d 126, 138-39 (1950); *State ex rel. Morris v. West Virginia Racing Comm.*, 133 W. Va. 179, 192-93, 55 S.E.2d 263, 271 (1949); *West Central Producers Co-Operative Ass'n v. Comm'r of Agriculture*, 124 W. Va. 81, 87-90, 20 S.E.2d 797, 801-03 (1942); 47 W. VA. L.Q. 145 (1940-41).

¹⁵ See *Tulley v. State Farm Mut. Auto. Ins. Co.*, 345 F. Supp. 1123 (S.D.W. Va. 1972).

administrative agency as a vital element in the process of government.¹⁶

Acceptance of the reality and necessity of administrative government did not spawn complacency. Rather, it produced an awareness that administrative institutions, too vital to avoid, were too important to leave uncontrolled. This was recognized at an early date, as reflected in the remarks of Elihu Root in his Presidential Address to the American Bar Association in 1916:

We are entering upon the creation of a body of administrative law quite different in its machinery, its remedies and its necessary safeguards from the old methods of regulation by specific statutes enforced by the courts. As any community passes from simple to complex conditions the only way in which government can deal with the increased burdens thrown upon it is by the delegation of power to be exercised in detail by subordinate agents, subject to the control of general directions prescribed by superior authority. The necessities of our situation have already led to an extensive employment of that method. . . . There will be no withdrawal from these experiments. We shall go on; we shall expand them, whether we approve theoretically or not, because such agencies furnish protection to rights and obstacles to wrong doing which under our new social and industrial conditions cannot be practically accomplished by the old and simple procedure of legislatures and courts as in the last generation. Yet the powers that are committed to these regulating agencies, and which they must have to do their work, carry with them great and dangerous opportunities of oppression and wrong. If we are to continue a government of limited powers these agencies of regulation must themselves be regulated. The limits of their power over the citizen must be fixed and determined. The rights of the citizen against them must be made plain. A system of administrative law must be developed, and that with us is still in its infancy, crude and imperfect.¹⁷

This challenge of regulating the regulators and devising fair and effective means for their control has been central to developments in administrative law, and efforts to meet this challenge focused principally on matters of procedure.¹⁸ Emphasis on administrative procedure is now common-place, with considerable reliance placed

¹⁶ See Davis, *Judicial Review of Administrative Action in West Virginia—A Study in Separation of Powers*, 44 W. VA. L.Q. 270, 270-71 (1938).

¹⁷ Root, *Public Service by the Bar*, 2 A.B.A.J. 736, 749-50 (1916).

¹⁸ See Schwartz, *supra* note 13, at 520-21, 531.

upon administrative procedure legislation to delineate pathways for the administrative process. The Federal Administrative Procedure Act is an example which readily comes to mind,¹⁹ but today most states also have comprehensive administrative procedure acts.²⁰ These laws are by no means the sole sources of control over administrative action, yet their fundamental nature and wide ranging application do reveal a general legislative commitment to control through procedural requirements.

Devotion to control of administrative agencies and selection of procedural safeguards as a means of achieving control, however, do not guarantee its realization. Administrators charged with massive and often overwhelming duties may not always share the concern of legislators, lawyers and others as to how a decision should be reached. Sometimes, the immediate object of the administrator's interest is to determine what is to be decided, or whether to make a decision at all, and not the procedural requirements of the decision making process. Most administrative procedure legislation takes these possibilities into account and provides negative incentives to encourage compliance. The ultimate sanction imposed under some circumstances is invalidation of the administrator's actions.²¹

Considering the obviously ambitious scope of a comprehensive administrative procedure act and the equally ambitious array of tasks with which administrative agencies have been entrusted, no single set of procedural devices is uniformly suitable for all. Law, logic and practicality preclude this. Fortunately, some degree of general delineation is possible, depending on the nature of the particular activity undertaken by an agency. Thus, legislatures have distinguished those situations where an agency acts in a manner comparable to a legislature from those where it acts in a man-

¹⁹ 5 U.S.C. §§ 551-59, 701-06 (1970 & Supp. IV 1974) (originally enacted as Act of June 11, 1946, ch. 324, 60 Stat. 237).

²⁰ What constitutes a comprehensive administrative procedure act is not necessarily susceptible to precise definition. However, even if one assumes that an act must cover rule making, adjudication, and judicial review in order to qualify as comprehensive, by 1975 over half of the states had such statutes. Bonfield, *The Iowa Administration Procedure Act: Background, Construction, Applicability, Public Access to Agency Law, The Rulemaking Process*, 60 IOWA L. REV. 731, 746-47 (1975) [hereinafter cited as Bonfield]. And as of 1970, about thirty-six states had general legislation in one or more areas of administrative law. K. DAVIS, *ADMINISTRATIVE LAW TREATISE*, § 1.04-5 (Supp. 1970).

²¹ See W. VA. CODE ANN. § 29A-3-3 (1976 Replacement Vol.).

ner comparable to a court, and devised different procedures for each. In the Federal Administrative Procedure Act, Congress attempted to separate administrative rule making from administrative adjudication.²² The same line is drawn in West Virginia, although the Legislature selected the term "contested case" rather than adjudication to characterize agency activities of a judicial nature.²³

This article deals with the rule-making function of administrative agencies in West Virginia. Rule making has been characterized as "one of the greatest inventions of modern government,"²⁴ and it is this aspect of administrative procedure which recently attracted the attention of the West Virginia Legislature and culminated in the 1976 Amendments. It is an area in which there is relatively little ambiguity concerning the desire and intent of the Legislature. Unfortunately, it is also one in which policies have been enunciated with greater enthusiasm than that with which they have been implemented. This article will explore the nature and scope of the rule-making function of West Virginia administrative agencies and the responsibilities in connection with rule making which have been assigned to various institutions of government, including the Legislature, the Secretary of State, and the agencies themselves. The closely related rights of the public to participate in the rule-making process will also be examined.

Following consideration of the basic structure of the rule-making process in West Virginia and related rights and responsibilities, attention will be shifted to the consequences which flow from inadequate implementation and performance of rule-making responsibilities prescribed by the Legislature. There is evidence in West Virginia with regard to the latter aspect that all that should have been done has not been done, thus raising serious questions of law and policy with regard to the validity and propriety of the current rules and regulations of numerous West Virginia agencies.

Unearthing problems alone does not guarantee their resolution. Consequently, this article presents some suggestions for eliminating present shortcomings and insuring the integrity and utility of the rule-making process, a task which requires the cooperation and vigilance of no single group or institution, but rather that of all institutions of government, the Bar and the public.

²² See 5 U.S.C. §§ 551(4), (5), (6), (7) (1970 & Supp. IV 1974).

²³ See W. VA. CODE ANN. §§ 29A-1-1 (c), (e) (1976 Replacement Vol.).

²⁴ K. DAVIS, *supra* note 20, § 6.15 at 283 (Supp. 1970).

II. DETERMINING THE APPLICABILITY OF THE RULE-MAKING PRINCIPLES AND PROCEDURES OF THE WEST VIRGINIA ADMINISTRATIVE PROCEDURE ACT

The determination of whether a specific act of government is subject to the principles and procedures for administrative rule making under the West Virginia Administrative Procedure Act is primarily a process of exclusion.²⁵ Reaching a conclusion on the issue requires consideration of the source of the governmental activity, the subject matter of the activity, the agency's statutory authority to make rules, and the nature of the activity.

A. *Application in Light of Institutional Source*

The source of the activity is relevant because not all institutions and individuals in government are affected by the Act. It applies to activities of an "agency," which is defined as "any state board, commission, department or officer authorized by law to make rules or adjudicate contested cases, except those in the legislative or judicial branches"²⁶ Only *state* boards, commissions, departments or officers come within the definition, but the limitation is deceptive in its simplicity. For example, the suggestion has been made that since there is no indication that the definition applies only to those having state-wide authority, it is possible that local organizations, such as, a County Board of Health, having statutory rule-making authority, are covered.²⁷ The Attorney General, however, has expressed the opinion that the Act was not meant to apply to a local board of education.²⁸ Similarly, it is thought that cities, towns and counties are not affected by the Act because of their representative capacity.²⁹ Clarification of the statute on these points would be useful, but for the present the key seems to be whether the agency was created by State government to exercise rule-making or adjudicatory powers.³⁰

²⁵ The entire matter of applicability of the Act has provided ample opportunity for confusion. See *State ex rel. Burchett v. Taylor*, 150 W. Va. 702, 149 S.E.2d 234 (1966) (first case to come before the Supreme Court of Appeals under the 1964 Act).

²⁶ W. VA. CODE ANN. § 29A-1-1(a) (1976 Replacement Vol.).

²⁷ Harrison, *The West Virginia Administrative Procedure Act*, 66 W. VA. L. REV. 159, 165 (1964) [hereinafter cited as Harrison].

²⁸ Op. W. Va. Att'y Gen., June 18, 1975.

²⁹ Harrison, *supra* note 27, at p. 165.

³⁰ 1 COOPER, STATE ADMINISTRATIVE LAW 97 (1965) [hereinafter cited as COOPER].

The legislative and judicial branches are also excluded from the definition of "agency." This exception is derived from the first tentative draft for revision of the Model State Administrative Procedure Act; however, the Model Act ultimately used the language "other than the legislature or the courts,"³¹ out of concern that "many administrative agencies in the exercise of a delegated legislative function may be considered as much in the legislative branch as in the executive."³² The language of the 1964 Act, however, does make clear that those in the legislative and judicial branches are excluded, meaning that not only the Legislature and courts themselves are outside the definition, but also those subordinate to them. Nevertheless, it has been suggested that agencies subject to staffing by appointment of the Governor are "within the executive department even though their responsibilities include those of the other two branches, particularly the legislature."³³

Other institutions of State government are also exempt from application of the Act, although not for all purposes. The exemption extends to the Board of Probation and Parole, the Public Service Commission, the Board of Public Works, the West Virginia Board of Education and the West Virginia Board of Regents.³⁴ There are, however, important features of rule-making procedure which do apply to these agencies; their final rules, for example, must be filed with the Secretary of State in order to become effective. All other procedural requirements relating to rule making under the Act do not apply to them.³⁵

B. *Application in Light of Subject Matter*

Even though agency action constitutes rule making and is initiated by one meeting the definition of agency, the Act is inapplicable if one of several general subject areas is involved. If an agency is engaged in promulgation of a rule "relating to . . . public elections, the conduct of inmates of public institutions, the con-

³¹ Harrison, *supra* note 27, at 166.

³² *Id.* at 165-66.

³³ *Id.* at 166.

³⁴ W. VA. CODE ANN. § 29A-1-2 (1976 Replacement Vol.).

³⁵ *Id.* The Workmen's Compensation Fund, the Department of Employment Security, the State Tax Commissioner, the State Road Commissioner, the State Road Commission, and the Teacher's Retirement Board are excepted from application of the requirements of the 1964 Act concerning contested cases. W. VA. CODE ANN. § 29A-5-5 (1976 Replacement Vol.). These agencies are, however, subject to rule-making procedures unless otherwise exempted. Harrison, *supra* note 27, at 167.

duct of students at public schools or public educational institutions, the conduct of persons in military service or the receipt of public assistance," it may proceed without regard to conditions otherwise imposed on the rule-making process.³⁶

C. *Application in Light of Authority to Make Rules*

Even though the institutional source of governmental activity meets the definition of agency and the subject matter is not exempt, there is still another issue which requires consideration. In the rule-making context, a state board, commission, department or officer must be "authorized by law to make rules."³⁷ "[B]efore any agency is subject to the Act's provisions it must have statutory authority to make rules or to adjudicate contested cases. The Act applies only to the extent that either or both are exercised or required to be exercised and reference to specific statutes by which an agency's authority is established is necessary."³⁸ Normally the Legislature is explicit and makes an express delegation of rule-making authority to administrative agencies. The State Road Commissioner, for example, is required to dispose of obsolete and surplus materials and is instructed to "adopt and promulgate rules and regulations governing and controlling the disposition of all such equipment, supplies and materials."³⁹ This is a typical delegation of rule-making authority.

The requirement that rule making be authorized by law is derived from the Revised Model Act and has been thought disadvantageous in that it would exempt "agencies authorized to affect private rights only through means other than rule-making . . . such as through informal action, investigation, negotiation, etc."⁴⁰ Furthermore, concern has been expressed that the "authorized by law" language may preclude judicial review where an agency not so authorized is attempting to make rules.⁴¹ In this light, Iowa and apparently Wisconsin have deleted this language from their definitions.⁴²

Much of the potential difficulty is eliminated if the concept

³⁶ W. VA. CODE ANN. § 29A-1-2 (1976 Replacement Vol.).

³⁷ W. VA. CODE ANN. § 29A-1-1(a) (1976 Replacement Vol.).

³⁸ Harrison, *supra* note 27, at 165.

³⁹ W. VA. CODE ANN. § 17-2A-14 (1974 Replacement Vol.).

⁴⁰ Bonfield, *supra* note 20, at 761.

⁴¹ *Id.* at 761-62.

⁴² *Id.* at 762.

of authorization by law is interpreted to include not only those instances where there is an express delegation of rule-making authority, but also those where authorization may be reasonably implied. It is recognized in West Virginia that "an administrative agency possesses, in addition to the powers expressly conferred by statute, such powers as are reasonably and necessarily implied in the exercise of its duties"⁴³ It may be especially important that implied rule-making authority be recognized in cases where literal interpretation of the definition of agency otherwise would exempt rule-making activities for failure to fall within the definition. The Act, for example, is intended to apply to interpretative as well as substantive rules,⁴⁴ but it would be unusual for a statute to contain express rule-making authority for interpretative rules. It is imperative that such authority be implied. Grappling with powers by implication is by no means an easy task;⁴⁵ yet this is necessary to prevent artificial distinctions concerning coverage of basic rule-making procedures.

D. *Application in Light of the Nature of the Activity*

The nature of the activity in relation to the concept of rule making is an issue for further inquiry in determining the application of rule-making procedures to specific agency action. Only if the activity constitutes rule making are rule-making procedures applicable.

1. Rules and Contested Cases Contrasted

Under the West Virginia Administrative Procedure Act "rule making" is defined as "the agency process for the formulation, amendment or repeal of a rule,"⁴⁶ thus establishing that the concept of rule making involves modification and abolition as well as creation of rules. "Rule" is defined to include "every regulation, standard, or statement of policy or interpretation of general application and future effect, including the amendment or repeal

⁴³ *State Human Rights Comm. v. Pauley*, 212 S.E.2d 77, 78 (W. Va. 1975). See *Colvin v. State Workmen's Compensation Comm'r*, 154 W. Va. 280, 289, 175 S.E.2d 186, 192. (1970).

⁴⁴ W. VA. CODE ANN. § 29A-1-1(c) (1976 Replacement Vol.).

⁴⁵ See COOPER, *supra* note 30, at 176-77.

⁴⁶ W. VA. CODE ANN. § 29A-1-1(d) (1976 Replacement Vol.). The 1976 Amendments include a provision which establishes that the terms "rule" and "regulation" are interchangeable for purposes of Art. 3 of the Act, as amended. W. VA. CODE ANN. § 29A-3-1 (1976 Replacement Vol.).

thereof, affecting private rights, privileges or interests, or the procedures available to the public, adopted by an agency to implement, extend, apply, interpret or make specific the law enforced or administered by it or to govern its organization or procedure"⁴⁷ The definition provided for by the Act, of "contested case," is useful to an understanding of the range and limits of rule making. Under the Act, the term "contested case," which relates to agency functions judicial in nature, "means a proceeding before an agency in which the legal rights, duties, interests or privileges of specific parties are required by law or constitutional right to be determined after an agency hearing, . . . and shall not include rule making."⁴⁸ The end product of the contested case process is an "order" which is "the whole or any part of the final disposition (whether affirmative, negative, injunctive or declaratory in form) by any agency of any matter other than rule making."⁴⁹ Comparison of these definitions reveals important contrasts which highlight the nature of rule making.

First, rules are of general application and, unlike contested cases, are not limited to specific parties. The impact of a rule may be significant on persons not involved whatsoever in a rule-making proceeding and not even aware of it. This general application reflects the legislative nature of rule making. A contested case, on the other hand, involves specific parties who themselves are directly affected and bound by the proceeding, and the effect of a decision in a contested case on those not a party normally is limited to the degree to which the decision has value as precedent in future adjudicatory proceedings.⁵⁰

Another feature of a rule under the Act is its future effect. The requirement of future effect is perhaps unnecessary because one would not expect a statement of general applicability to operate

⁴⁷ W. VA. CODE ANN. § 29A-1-1(c) (1976 Replacement Vol.).

⁴⁸ *Id.* § 29A-1-1(e).

⁴⁹ *Id.* § 29A-1-1(f).

⁵⁰ This contrast between rule making and the adjudication of contested cases is illustrated by the following excerpt:

Unlike an administrative order or a court judgment adjudicating the rights of individuals, which is binding only on the parties to the particular proceeding, a valid exercise of the rule-making power is addressed to and sets a standard of conduct for all to whom its terms apply. It operates as such in advance of the imposition of sanctions upon any particular individual.

Columbia Broadcasting System v. United States, 316 U.S. 407, 418 (1942).

other than prospectively,⁵¹ yet it does serve to reinforce the idea that rule making is legislative in nature. In contrast, the result in the contested case usually will have retroactive consequences for the specific parties to the proceeding.

Third, rule making does not involve an opportunity to be heard in an agency hearing. The public in general has opportunities, prescribed by statute, to participate in the rule-making process. While an agency cannot deny fundamental opportunities to participate in rule making, it may and usually does act without formal hearing. The contested case involves situations where the decision can be reached only on the basis of an agency hearing required by either statute or constitution.

2. Nature of Activities Within the Definition

Comparison of rule making and the contested case offers insights on the nature of rule making; however, it is the Act's definition of a "rule" which is the focal point for a determination of whether specific government activity falls within the rule-making category. The reach of the definition is considerable, and intentionally so. "Rule" includes "every regulation, standard, or statement of policy or interpretation"⁵² The effect of this language is to reduce the possibility of an agency avoiding the responsibilities of prescribed procedures simply by altering the form, but not the substance of its actions. At one time, for example, a Michigan statute required a hearing for rules, but not for regulations, adopted by the Michigan Unemployment Compensation Commission. During one period twenty regulations and only two rules were adopted, and this inclination on the part of some agencies seems to exist beyond isolated instances.⁵³ The characterization of agency action as rule making is best related to the nature of what the agency is doing rather than what it says it is doing.

Other language in the definition produces similar results. The definition leaves no basis for contention that rules are confined to implementation or application of the law. Pronouncements which "interpret or make specific the law enforced or administered by [an agency] or . . . govern its organization or procedure . . ." are expressly included.⁵⁴ Established policy on agency interpretations

⁵¹ COOPER, *supra* note 30, at 108.

⁵² W. VA. CODE ANN. § 29A-1-1(c) (1976 Replacement Vol.).

⁵³ COOPER, *supra* note 30, at 108 n.61.

⁵⁴ W. VA. CODE ANN. § 29A-1-1(c) (1976 Replacement Vol.).

of law, organization and procedure often is of major significance to one dealing with or affected by agency action, and the definition reflects this by placing interpretive and procedural matters and those more substantive in nature on an equal footing.⁵⁵

Often determinations of whether specific agency action constitutes rule making and of whether the agency must proceed by rule making or has a choice⁵⁶ are uncertain and ambiguous. One area, however, which is relatively free from limitations of this nature involves procedural rules. The Act instructs each agency to "adopt rules or regulations governing the formal and informal procedures prescribed or authorized by this chapter" and provides that these rules "shall include rules of practice before the agency, together with forms and instructions."⁵⁷ Procedural rules are mandatory for each agency.

3. Nature of Activities Beyond the Definition

In addition to those limitations implicit in the definition of rule, there are certain matters expressly excluded. As a result the concept "does not include regulations relating solely to the internal management of the agency . . . nor mere instructions."⁵⁸ There is little doubt that the imposition of rule-making requirements on

⁵⁵ The application of rule making procedures to agency interpretative and policy statements is not without potential adverse effect on public notice and participation. Normally, an agency is under no legal obligation to issue statements of interpretation or policy. It has been suggested that to require rule-making procedures in these situations will result in fewer interpretative rulings and statements of policy, thus depriving the public of beneficial clarification of the law. Utton, *How to Stand Still Without Really Trying: A Critique of the New Mexico Administrative Procedures Act*, 10 NAT. RESOURCES J. 840, 843-44 (1970). See Bonfield, *Some Tentative Thoughts on Public Participation in the Making of Interpretative Rules and General Statements of Policy Under the A.P.A.*, 23 AD. L. REV. 101 (1971), for a discussion generally supporting the federal exclusion of interpretative rules and statements of policy from normal rule-making procedures. There is some indication of resistance in the West Virginia Supreme Court of Appeals to treatment of statements of interpretation and policy on the same basis as substantive rules, despite the statutory definition of rule. In one case, the court rejected the argument that an agency which purported to base its decision in a contested case on "long standing policy" was required to file its policy with the Secretary of State. The court concluded that a policy applied in reaching a decision in a case is not a rule under the 1964 Act, although it declared the policy invalid for other reasons. *Haines v. Workmen's Compensation Comm'r*, 151 W. Va. 152, 157, 150 S.E.2d 883, 886 (1966).

⁵⁶ See *NLRB v. Wyman - Gordon Co.*, 394 U.S. 759 (1969).

⁵⁷ W. VA. CODE ANN. § 29A-3-2 (1976 Replacement Vol.).

⁵⁸ W. VA. CODE ANN. § 29A-1-1(c) (1976 Replacement Vol.).

agency action affects the efficiency of agency operations. Although sacrifices in terms of efficiency may be beneficial to the fairness and the quality of the agency's actions, the lines drawn here by the Legislature indicate that there is a point at which efficiency must prevail. Although matters of internal management or mere instructions may be of great importance to those outside the agency, and it is not unprecedented to limit the exclusion to situations where legal rights are not substantially affected,⁵⁹ the West Virginia Act does not go so far. It does exclude, however, only regulations relating "solely" to internal agency management.⁶⁰ Any mingling of matters not otherwise excluded in a regulation concerning agency management would bring the entire regulation within the general definition.

The only other express exclusion relates to "regulations of which notice is customarily given to the public by markers or signs. . . ."⁶¹ The effect of this provision is to preclude results which otherwise run contrary to common understanding and expectations. In one case the New York Court of Appeals faced, on the one hand, a driver convicted of exceeding the posted speed limit and, on the other, a state agency which had not filed its order fixing the limit. The controversy centered on whether fixing of the speed limit constituted creation of a rule. Although the agency argued that it had issued an order rather than a rule, the court indicated that: "[t]he term 'rule or regulation', . . . embraces any kind of legislative or quasi-legislative norm or procedure which establishes a pattern or course of conduct for the future. The label or name employed is not important and, unquestionably, many so-called 'orders' come within that term."⁶² Consequently, the rule, while it had been posted, had not been filed and was therefore unenforceable. The West Virginia definition eliminates the possibility of this kind of result.

Determining the applicability of rule-making principles and procedures in light of the pertinent terms and definitions under the Act is often a difficult task, especially when an assessment of the subject or nature of government activities is required. The dilemma is in no sense unique to the West Virginia Act. It presents

⁵⁹ See Bonfield, *supra* note 20, at 833.

⁶⁰ W. VA. CODE ANN. § 29A-1-1(c) (1976 Replacement Vol.).

⁶¹ *Id.*

⁶² *People v. Cull*, 10 N.Y.2d 123, 126, 176 N.E.2d 495, 497, 218 N.Y.S.2d 38, 40 (1961). But see *Maestas v. Christmas*, 63 N.M. 447, 321 P.2d 631 (1958).

precisely the kind of problems one would expect when general terms are intended to reach an extremely wide range of activities. Whether rule-making principles and procedures apply in an individual case is of fundamental and far-reaching importance. If an act of government falls within the concept of a rule, the panoply of rule-making procedures bears on the manner in which the government acts. Otherwise, the government may act relatively free from mandatory procedural obligation under the Act. This assumes that the procedures for contested cases and other more specific statutes pertaining to individual agencies, if any, do not apply.

The magnitude of the stakes warrants careful consideration of whether a particular activity does or does not constitute rule making under the Act. Failure to comply when otherwise required may result in invalidation of a rule. The need for scrutiny is even greater when one considers that the latitude afforded for interpretation carries with it the potential for abuse. Assuming, as seems justified, that many agencies are not likely to revel in the niceties of rule-making procedure, it is not unreasonable to expect some to seek ways to bypass the process. One avenue open to the agency is simply to promulgate rules and ignore prescribed procedures. Theoretically, success along these lines will be shortlived. An agency might adopt the less blatant approach of interpreting its way around the procedural requirements.⁶³ The relevant definitions provide opportunities of this nature; thus, it is critical that the authority to make rules be identified and that individual agency activity be given the scrutiny necessary to determine its source, subject matter and nature from which procedural requirements naturally follow.

III. THE RULE-MAKING PROCESS IN WEST VIRGINIA

The procedural obligations relating to rule making in West Virginia are not cast upon a single institution or person. The responsibilities are shared, with the principal burdens placed on the agencies themselves and the Secretary of State. The Legislature and the courts also have significant roles which are more supervi-

⁶³ For example, agencies have been known to abuse their power to make emergency rule-making power, thus avoiding normal rule-making procedures. Note, *Rulemaking and Adjudication Under the Florida Administrative Procedure Act*, 27 U. FLA. L. REV. 755, 760 (1975); see, e.g., *Poschman v. Dumke*, 31 Cal. App. 3d 932, 107 Cal. Rptr. 596 (1973).

sory in nature, although under the 1976 Amendments the Legislature is more intimately involved in rule-making matters. Failure to meet these assigned responsibilities creates a substantial risk that the ultimate beneficiary, the public, will be deprived of its right to meaningful participation in the rule-making process. For this reason, a thorough understanding of the responsibilities of each branch of government is essential, if the process is to function as intended.

A. *The Responsibilities of State Agencies*

One source of agency responsibilities in rule-making is statutory law. Considerations of constitutional law, familiar in so many areas including administrative adjudication, are of considerably less relevance in rule-making proceedings.⁶⁴ Traditional concepts of procedural due process of law do not require notice and an opportunity to be heard before promulgation of a rule, in the absence of a statute providing for notice and hearing.⁶⁵ It is accepted that "in legislation, or rule-making, there is no constitutional right to any hearing whatsoever."⁶⁶ There may be, however, state constitutional provisions which bear on such issues. Publication of agency rules prior to their effective date was found to be constitutionally required in Wisconsin⁶⁷ because of a constitutional provision providing "no general law shall be in force until published."⁶⁸ Yet, determining that process which is due in rule making does not turn ordinarily on principles of constitutional law but rather on requirements found in the comprehensive administrative procedure act and in statutes addressing specific agencies. Generally, statutory procedural requirements pertain to two major areas: (1) the nature and manner of notice to the public of rule-making activities, and (2) the extent and nature of the public's right to participate in the rule-making process.

Another important source of agency responsibilities in rule-

⁶⁴ E.g., Schwartz, *supra* note 12, at 161-62, 198-200; Subrin and Dykstra, *Notice and the Right to be Heard: The Significance of Old Friends*, 9 HARV. CIV. RIGHTS-CIV. LIB. L. REV. 449, 460 (1974); Note, *The Judicial Role in Defining Procedural Requirements for Agency Rulemaking*, 87 HARV. L. REV. 782, 785-86 (1974).

⁶⁵ E.g., *Bi-Metallic Co. v. Colorado*, 239 U.S. 441 (1915); see Keefe, *Administrative Rule-Making and the Courts*, 8 FORDHAM L. REV. 303, 323-24 (1939).

⁶⁶ *Willapoint Oysters v. Ewing*, 174 F.2d 676, 694 (9th Cir. 1949), *cert. denied*, 338 U.S. 860 (1949).

⁶⁷ *Whitman v. Department of Taxation*, 240 Wis. 564, 4 N.W.2d 180 (1942).

⁶⁸ WIS. CONST. art. 7, § 21.

making is the agency itself. It is easy to overlook the point that the basic procedural requirements prescribed by statute are minimum procedures demanded of an agency if its act is to have validity. The fact that legislatures have not chosen to establish greater requirements does not mean that an agency cannot and should not go beyond minimum procedural requirements and impose on itself responsibilities as a matter of policy, especially when one considers that legislatures must undertake the difficult task of devising general requirements for a broad class of disparate institutions of government. The fact that an oral hearing is not required by either statutory or constitutional law in a particular case should not lead the agency inescapably to the conclusion that none is necessary.⁶⁹ It may be that on occasion some form of oral presentation by interested persons would improve the quality of the agency's rule and thereby its service to the public.⁷⁰ In this sense the self-imposed obligation may be more an opportunity than a burden, although not one to be seized without careful reflection on the consequences. If an agency elects to adopt a regulation establishing self-imposed procedural obligations, their voluntary nature allows no greater freedom to ignore them than that which is permissible with respect to requirements imposed by statute.⁷¹ Therefore, there are often situations in which an agency might develop policy through rule making, even though there is no clear obligation that it do so. Professor Kenneth Culp Davis has argued persuasively in favor of rule making as a mechanism for structuring the exercise of administrative discretion.⁷² Agencies have also been urged to proceed by rule making rather than case-by-case adjudication

⁶⁹ Under the 1976 Amendments, for example, a notice of proposed rule making must afford an opportunity for public participation, "orally or in writing," thus leaving the issue of an oral presentation to the discretion of the agency. W. VA. CODE ANN. § 29A-3-8 (1976 Replacement Vol.).

⁷⁰ Opportunities of this nature exist throughout the administrative process, limited principally by the imagination and commitment of administrators to public participation. See generally Gellhorn, *Public Participation in Administrative Proceedings*, 81 YALE L.J. 359 (1972).

⁷¹ E.g., *Service v. Dulles*, 354 U.S. 363 (1957); *Hou Ching Chow v. Attorney General*, 362 F. Supp. 1288 (D. D. C. 1973); cf. *Florida Livestock Bd. v. Gladden*, 76 So. 2d 291 (Fla. 1954) (An agency was bound by a rule voluntarily delaying the effective date of a statute). But see Berger, *Do Regulations Really Bind Regulators?*, 62 NW. U.L. REV. 137 (1967); Note, *Violations by Agencies of Their Own Regulations*, 87 HARV. L. REV. 629, 629-30 (1974).

⁷² K. DAVIS, *DISCRETIONARY JUSTICE* (1969).

when they have a choice, as a means of encouraging public participation in agency policy making.⁷³

It is the statutory source of procedural requirements which is of greatest consequence. Lapses in the application and enforcement of statutory requirements involve deficiencies in what must be, whereas self-imposed obligations relate to what should be. The subsequent discussion deals with the statutory requirements under the West Virginia Administrative Procedure Act, before and after its amendment in 1976.

1. Notice of Proposed Rule Making

Recognition of the value of public participation in the rule-making process is itself insufficient. There must be effective means for notification to the public of what an agency proposes to do. To accomplish this, a variety of techniques has been employed, ranging from formal publication in government publications, such as, the Federal Register, to personal notice, to publication in newspapers of general circulation. All seek an accommodation between effective notice and practicability, with varying degrees of success.⁷⁴

Prior to the 1976 Amendments, the 1964 Act addressed public participation in the rule-making process through a combination of limited personal notice and voluntary agency publication. Under this arrangement the validity of agency rule making depended in part upon providing personal notice by mail to persons requesting it. The class entitled to notice was limited to those who filed a written request with the agency, and the agency was entitled to charge a nominal fee of not more than one dollar for providing this

⁷³ See generally Cramton, *The Why, Where and How of Broadened Public Participation in the Administrative Process*, 60 GEO. L.J. 525, 535-36 (1972); Fuchs, *Agency Development of Policy Through Rule-Making*, 59 NW. U.L. REV. 781 (1964); Robinson, *The Making of Administrative Policy: Another Look at Rule-making and Adjudication and Administrative Procedure Reform*, 118 U. PA. L. REV. 485 (1970); Shapiro, *The Choice of Rule-making or Adjudication in the Development of Administrative Policy*, 78 HARV. L. REV. 921 (1965). See also Hanes, *Citizen Participation and its Impact Upon Prompt and Responsible Administrative Action*, 24 SW. L. J. 731 (1970).

⁷⁴ The degree of flexibility permissible in designing notice of rule making is absent in contested cases. See *State ex rel. Hawks v. Lazaro*, 202 S.E.2d 109, 124 (W. Va. 1974). This case concerned a commitment to a state hospital where the court stated "[n]otice contemplates meaningful notice which affords an opportunity to prepare a defense and to be heard upon the merits."

notice of proposed rule making. A request applied only to proposals made during the calendar year in which the request was made.⁷⁵ If the agency elected to publish notice, it could do so in the form of a legal advertisement in qualified newspapers having general circulation.⁷⁶

There was nothing perfunctory in the form prescribed for the required notice under the 1964 Act. Although it was not mandatory that the express terms of the proposed rule be included in the notice, an "informative summary" was required in the alternative. The notice had to indicate "the time, date and place at which interested persons may submit data, objections, suggested amendments, views, evidence and arguments orally or in writing concerning the proposed rule"⁷⁷ It also was required that notice be timely, in recognition of the likelihood that notice too soon or too late would be less conducive to meaningful participation; thus, notice was to be given not less than thirty nor more than sixty days before the date indicated in the notice.⁷⁸

Under the 1964 Act, the requirements dealing with dissemination of notice were severely limited in scope, whereas the law was substantially thorough and complete in its emphasis on informative and timely notice. This contrast need not be attributed to legislative oversight or lack of vision. The more temperate view would appear to be that these particular requirements are a product of the process of weighing the public's interest in receiving notice against the public's interest in the efficiency and economy of government. In any event, this limited responsibility placed on agencies to disseminate notice only to those requesting it was costly in its own fashion. Empirical study of agency practice and experience would be appropriate and desirable to measure these costs, but the terms of the statute alone justify and support some general observations and conclusions.

The requirement of an affirmative request for notice assumed that members of the public would know which state agencies might propose rules on which they might desire to comment. Considering the breadth of the definition of "agency" under the 1964 Act, the assumption was not entirely reasonable. A person interested in

⁷⁵ Acts of the 56th W. Va. Leg. ch. 1, § 29A-3-2, Reg. Sess. [1964] (amended and reenacted 1976).

⁷⁶ *Id.*

⁷⁷ *Id.*

⁷⁸ *Id.*

government rule making affecting agriculture, for example, might have been expected to file a request for notice with the Department of Agriculture, but was it reasonable to expect that person, unfamiliar with the intricacies of the law, also to submit a similar request to the Department of Natural Resources, the Tax Commissioner and others who on occasion may engage in rule making affecting agricultural matters? There could be no reasonable expectation of participation in the process by large segments of the public unaware of what to do and how to do it. Nor can it be assumed that even the initiated were afforded a reasonable opportunity to participate. A member of the Bar whose practice was to some degree specialized could have been expected to submit an appropriate request to the appropriate agencies, yet the general practitioner, whose practice encompassed a wide range of client interests, confronted the spectre of submitting a request to myriad state agencies. Whether this was done on any significant scale is not known, but if it were, the burden was considerable and continuing, since a request did not extend beyond the calendar year in which it was made.

The 1976 Amendments have shifted the balance dramatically, and promise to introduce an element of reality to the idea of public participation in agency rule making. Under the new law, an agency must file its proposed rule in the newly created state register.⁷⁹ The responsibilities placed on the Secretary of State to publish the state register and weekly supplements thereto⁸⁰ should provide a more realistic opportunity for public access to the basic information necessary to an informed exercise of rights to participate in the rule-making process. These developments do not ensure that we have or ever will have reached the millennium.⁸¹ Admittedly, a cursory examination of any issue of the Federal Register suggests that its principal utility is to the initiated and not to the public at large. This is so despite honest efforts to meet criticism of this nature.⁸² It is to be expected that once a generally satisfactory

⁷⁹ W. VA. CODE ANN. § 29A-3-7 (1976 Replacement Vol.).

⁸⁰ W. VA. CODE ANN. § 29A-3-4 (1976 Replacement Vol.).

⁸¹ See generally Ashman, *Representation for the Poor in State Rulemaking*, 24 VAND. L. REV. 1 (1970); Newman, *Government and Ignorance - A Progress Report on Publication of Federal Regulations*, 63 HARV. L. REV. 929 (1950); Futor, *Searching the Federal Regulations: Forty-Seven Steps Are Too Many*, 45 A.B.A.J. 43 (1959). See also *Federal Crop. Ins. Corp. v. Merrill*, 332 U.S. 380, 387 (1947) (Jackson, J., dissenting).

⁸² In 1973, new features were added to the Federal Register to make the publi-

means of distributing notice has been established, attention will tend to shift to appraisal of the usefulness of the information provided.

2. Public Participation

It is public notice which creates the opportunity for the exercise of the fundamental right of public participation in the rule-making process. This right provides an opportunity for public influence on the development and course of agency policy making by administrative rules. Failure to exercise this right does not foreclose subsequent public influence on agency rules; there are also rights to petition for amendment or repeal of final rules⁸³ as well as possibilities to enlist the aid of the legislature.⁸⁴ Participation when the rule is only in proposed form, however, has definite advantages. At this stage the agency has not necessarily made a formal and irrevocable commitment. Thus, emphasis for the public participant is on what the agency should do and why. Once a rule becomes final, the emphasis shifts to what the agency should have done. In the latter case the public participant's task is more difficult.

The 1964 Act provided various opportunities for public participation, including submission of "data, objections, suggested amendments, views, evidence and arguments orally or in writing"⁸⁵ This alone did not impose on an agency a duty to afford a formal hearing nor any form of oral presentation. Whether to provide such was a matter committed to agency discretion, absent some other statutory requirement. These basic rights of public participation are comparable to those provided at the federal level in what is commonly referred to as informal or notice-and-

cation more usable, including weekly reminders on deadlines for commenting on proposals and a daily listing of rules going into effect. 38 Fed. Reg. 1569 (1973).

⁸³ The 1964 Act expressly provided that interested persons were entitled to petition an agency for the promulgation, amendment or repeal of any rule. Acts of the 56th W. Va. Leg. ch. 1, § 29A-3-6, Reg. Sess. [1964] (amended and reenacted 1976). The 1976 Amendments amended and reenacted Article 3 in its entirety. Probably through oversight, § 29A-3-6 was not reenacted. As a matter of sound policy, agencies still should accept and consider such petitions. In the event a need to amend the Act again arises, the Legislature should correct the apparent oversight.

⁸⁴ The legislative review process provides an opportunity of this nature. W. VA. CODE ANN. §§ 29A-3-11, -12 (1976 Replacement Vol.).

⁸⁵ Acts of the 56th W. Va. Leg. ch. 1, § 29A-3-3, Reg. Sess. [1964] (amended and reenacted 1976).

comment rule making.⁸⁶ The primary impact of the 1964 Act was to make possible submission to the agency of whatever an interested person considered germane to the rule-making proceeding as a matter of right rather than special dispensation.

The 1976 Amendments retained these basic rights of public participation,⁸⁷ and created new ones. Sometimes the Legislature delegates only conditional rule-making authority to an agency, the exercise of which is dependent upon the existence of certain circumstances or conditions. The determination of their existence is left to the agency, but the agency may issue rules only when it finds or determines that the circumstances or conditions exist. The Commissioner of Agriculture, for example, is empowered to promulgate regulations requiring a statement of the minimum percentage of calcium and magnesium compounds in the labeling of agricultural liming materials, but only if he "should find . . . that a requirement for listing the percentage of calcium and magnesium in elemental form would help in reducing among the states conflicting labeling requirements and would not impose an economic hardship on purchasers of liming materials"⁸⁸ In such cases the law now requires that a notice of hearing be filed in the state register.⁸⁹ The purpose of the hearing is "for the taking of evidence upon the issues to be found," and the notice must state the time and place of the hearing and provide a general description of the issues to be decided. Provision also is made for discretionary publication of notice in the form of a legal advertisement.⁹⁰

The procedural significance of this new provision is unclear. As an abstract proposition it appears that an additional procedural step is required where agency findings and determinations are a condition precedent to agency action. An agency first would be required to file its notice for publication in the state register and thereafter conduct the prescribed hearing on the findings and determinations to be made. Once it had made the findings and determinations fulfilling the condition precedent, an agency then would file its findings and determinations in the state register,⁹¹ and only then could it file its notice of proposed rule making in accordance

⁸⁶ 5 U.S.C. § 553 (1970); see SCHWARTZ, *supra* note 12, at 165-69; e.g., *Mobil Oil Corp. v. Federal Power Comm.* 483 F.2d 1238, 1249 (D.C. Cir. 1973).

⁸⁷ W. VA. CODE ANN. §§ 29A-3-8, -9 (1976 Replacement Vol.).

⁸⁸ W. VA. CODE ANN. § 19-15A-3(e) (1977 Replacement Vol.).

⁸⁹ W. VA. CODE ANN. § 29A-3-5 (1976 Replacement Vol.).

⁹⁰ *Id.*

⁹¹ W. VA. CODE ANN. § 29A-3-6 (1976 Replacement Vol.).

with the general requirements under the 1976 Amendments. Separate treatment and consideration of the conditions for rule making and the substance of the proposed rule would guarantee that each received undivided attention. Perhaps there would be greater likelihood that a required finding that certain conditions exist would be a product of conscious deliberation rather than unscrutinized assumption.

This view would be more persuasive if there were material differences between public participation with respect to a notice of hearing as compared to a notice of a proposed rule making. The fact is that there are not because under the 1976 Amendments an agency is entitled to limit presentations at a hearing on a condition precedent to written submissions.⁹² It may allow oral presentations, but there is no requirement that it do so. The statute provides that if only written statements are to be received, the "date of the hearing" is considered to be the last day on which statements may be filed with the agency.⁹³ Any hearing in the more traditional sense is entirely optional, just as in the case of proposed rules. Based on these uncertainties and the absence of other means of determining the intent of the legislature, it would not seem unreasonable for an agency to combine both notices in a single document for filing in the state register. The statute requires clarification if something else is intended.⁹⁴

There is no assurance that the exercise of public rights of participation will have any impact on the course of agency rule making. Agencies are not limited to consideration of that which is received in response to their proposal. In notice-and-comment rule making, unlike adjudication, the concept of a decision based on the record before the agency does not apply. The agency is entitled to take into account and give substantial weight to matters far beyond what may be raised in public comments.⁹⁵ This does not mean that an agency may arbitrarily or capriciously disregard

⁹² W. VA. CODE ANN. § 29-3-5 (1976 Replacement Vol.).

⁹³ *Id.*

⁹⁴ In that event, § 29A-3-5 should also be amended to provide for the timeliness of a notice of hearing. That issue is not dealt with in the statute at present, although the prudent practice for an agency would be to apply the not-less-than-thirty-nor-more-than-sixty-day rule applicable to proposals. W. VA. CODE ANN. § 29A-3-8 (1976 Replacement Vol.). Of course, a combined notice setting the same date for both purposes would accomplish this automatically.

⁹⁵ See generally SCHWARTZ, *supra* note 12, at 167-69.

public response to a proposed rule.⁸⁶ Nor should it suggest that public participation is a mere exercise in futility. That the public *may* participate is likely to have salutary effects on the agency as it shapes its proposal. One would hope and expect that public comment would precipitate some modification in the content of final agency rules. Proof of this hypothesis lies in examination of the practices of specific agencies, but experience suggests it to be true.

3. Notice of Final Rules

Both the notice and public hearing provisions for proposed rules are designed to facilitate public participation in the formulation of policy by rule making. Notice requirements for final rules have a quite different purpose and are intended to bring about public compliance with those policies, once formulated and prescribed. These requirements attempt to alleviate the basic unfairness of imposing sanctions for violation of a law which is unknown and not reasonably available. Dean Griswold suggested in 1934, in discussing the need for a federal publication for agency rules, that "[u]ntil some such measure is adopted, it may well be said that our government is not wholly free from Bentham's censure of the tyrant who punishes men 'for disobedience to laws or orders which he had kept from them knowledge of.'"⁸⁷ Bentham's point is equally relevant at the state level, and the objective is to be sought not as a consequence of legal duty or requirement which compels notice. All manner of legislative requirements and sanctions are imposed without knowledge or notice to those who are affected. Rather, notice requirements for final rules recognize that principles of fundamental fairness may demand that legislatures provide that which the law does not otherwise provide.

The West Virginia Administrative Procedure Act has relied on a system involving filing and publication to provide notice of final rules, with the basic responsibilities divided between the agencies and the Secretary of State. The principal obligation of the agencies has been the filing of final rules with the Secretary of State. For

⁸⁶ Under the Act there is provision for declaratory judgment proceedings to determine the validity of administrative rules. One ground for declaring a rule invalid is a finding that it is arbitrary or capricious. W. VA. CODE ANN. § 29A-4-2(b) (1976 Replacement Vol.).

⁸⁷ Griswold, *Government in Ignorance of the Law - A Plea for Better Publication of Executive Legislation*, 48 HARV. L. REV. 198, 213 (1934).

purposes of the initial transition to implement the 1964 Act, agencies were required to compile and index all lawfully adopted rules in force on July 1, 1964, the effective date of the Act. A deadline of January 1, 1965, was established for filing by each agency of two certified copies of the compilation and index with the Secretary of State.⁹⁸ In the case of rules adopted after the July 1, 1964, effective date, the Act required agencies to file two certified copies with the Secretary of State.⁹⁹

Under the 1976 Amendments agency responsibilities in connection with notice of final rules have been enlarged, but the emphasis on filing obligations has been retained. The Act now provides that following publication of notice of proposed rule making and opportunity for public participation, "the agency shall either finally adopt the rule or regulation as proposed, amend and finally adopt the proposed rule and regulation, as amended, or withdraw the proposed rule or regulation."¹⁰⁰ Previously the Act was silent on what was expected of an agency if, after proposing a rule, it elected to abandon the effort. It is now clear that the agency must "file in the state register a notice of its action."¹⁰¹ This includes a withdrawal of a proposal. This requirement has considerable merit, since a proposed rule often is used by persons as a guide to what may be expected and required of them in the future. Some persons may even consider modifying current practices in anticipation of a final rule, and many could be expected to make plans for necessary adjustments in the future. Abandonment of the proposal is information of potential importance to such persons and worthy of formal publication.

The notice of agency action on its proposal, when it results in a final rule, must include the text of the rule as finally adopted.¹⁰² This is especially important when one considers the possibility of change in a proposal following public participation and legislative review of the proposal. It is conceivable that a final rule might depart from the proposal to an extent that they are more dissimilar than similar. The 1976 Amendments provide for this and require that "no amendment may change the main purpose of the pro-

⁹⁸ W. VA. CODE ANN. § 29A-2-1(a) (1976 Replacement Vol.).

⁹⁹ Acts of the 56th W. Va. Leg. ch. 1, § 29 A-3-4, Reg. Sess. [1964] (amended and reenacted 1976).

¹⁰⁰ W. VA. CODE ANN. § 29A-3-10 (1976 Replacement Vol.).

¹⁰¹ *Id.*

¹⁰² *Id.*

posed rule or regulation.”¹⁰³ A change in the rule’s main purpose would necessitate treatment of the amended rule as a new proposal requiring a new notice of proposed rule making and opportunity for public comment and legislative review.

Agencies also are required to file their findings and determinations in those cases where these are a condition precedent to rule making. They must “state fully and succinctly the reasons therefor.”¹⁰⁴ The statement of reasons and a transcript of all evidence received in response to the agency’s notice must be preserved for at least five years after the hearing date set in the notice and be available for public inspection and copying.¹⁰⁵ The statute is ambiguous concerning whether the filed findings and determinations should also include the statement of reasons. Literal interpretation of the statute indicates that it need not be, but it would be sound and sensible policy for agencies to do so.

4. Extraordinary Circumstances and Emergency Rule Making

Many of the matters entrusted to administrative agencies over which they have rule-making authority involve fundamental interests of public protection. Under extraordinary circumstances time may not allow compliance with normal rule-making procedures without jeopardizing those interests. This was taken into account in the 1964 Act and in the 1976 Amendments in special provisions for rule making in emergency situations.

Under the 1964 Act agencies were empowered to adopt rules with immediate effect, notwithstanding the requirements for notice and public participation with respect to proposed rules. This was permitted in emergency situations where immediate effectiveness was “necessary for the immediate preservation of the public peace, health, safety or welfare” and was accomplished by filing the rule along with the agency’s finding of an emergency and a brief statement of its reasons for its conclusion.¹⁰⁶ After the fact the agency was obligated to give notice of the emergency rule to the same persons and in the same manner prescribed for notice of proposed rule making.¹⁰⁷ Any temptation to use emergency proce-

¹⁰³ *Id.*

¹⁰⁴ W. VA. CODE ANN. § 29A-3-6 (1976 Replacement Vol.).

¹⁰⁵ *Id.*

¹⁰⁶ Acts of the 56th W. Va. Leg. ch. 1, § 29A-3-5, Reg. Sess. [1964] (amended and reenacted 1976).

¹⁰⁷ *Id.*

dures in substitution for normal procedures was anticipated and dealt with by confining the effective period of an emergency rule to ninety days. In order for an emergency rule to be effective beyond ninety days, an agency was required to comply with the normal procedures for public notice and participation in proposed rule making.¹⁰⁸

The 1976 Amendments retain the basic concept of emergency rule making and allow agencies to make temporary rules having immediate effect. Unfortunately, the law no longer contains any indication of what constitutes an emergency situation, whereas the 1964 Act did give some guidance on the issue. Any increased probability of abuse of the abbreviated procedures for temporary rules as a result of the breadth of the concept is diminished by retention of the requirement that temporary rules are effective for only ninety days.¹⁰⁹ Only if the agency fulfills the normal rule-making requirements may the temporary rule remain in effect any longer, and normal requirements for a proposed rule include legislative review as well as public notice and participation.¹¹⁰ Legislative review raises the question of the feasibility of promulgating such a rule within the ninety day limit on its effectiveness, since the time allowed for legislative review is significantly greater. The statute does not allow for multiple ninety day periods,¹¹¹ but an agency can try to obtain expedited review of its rule.

B. Responsibilities of the Secretary of State

Theoretically there is no reason why the entire burden of providing public notice of proposed and final rules could not rest with the agencies themselves. This was the case in West Virginia for notice of proposed rule making prior to the 1976 Amendments. Nonetheless, the practical consequences of relying on the agencies for notice of final rules to both the agencies and the public can be significant. Time devoted by agencies to the mechanics of procedural compliance, such as mailing and printing, might be spent more productively on substantive matters. For the public, the

¹⁰⁸ *Id.*

¹⁰⁹ W. VA. CODE ANN. § 29A-3-14 (1976 Replacement Vol.).

¹¹⁰ Some jurisdictions have rejected the emergency requirement and allowed avoidance of normal procedures where "the monetary or other loss attendant to public rule-making procedures far outweighs any possible societal benefits." Bonfield, *supra* note 20, at 861.

¹¹¹ W. VA. CODE ANN. § 29A-3-14 (1976 Replacement Vol.).

time, inconvenience and uncertainty of dealing with agencies on an individual basis to obtain notice of proposed and final rules can reduce drastically the utility and availability of notice. To require that one go to each particular agency for its proposed and final rules may result in duplication of effort and drain the resources and energies of the public as well as the agencies.¹¹²

There are no doubt a few who would suggest there is merit in a system which demands a bit of inconvenience, a bit of pain, to receive its benefits. In this way, the process will function unimpeded by those who are simply curious; demands will be made only by those who want to know with sufficient urgency and intensity to put themselves to the trouble. There is no reason to believe that thoughts of this nature are at the heart of systems of rule-making procedure which place principal burdens for providing notice on the agencies. The 1964 Act on its face reveals a commitment to the virtues of public notice and participation even though it places considerable burdens on the public. The statute appears not to have gone as far as it might have out of concern for government efficiency. This was, for example, the apparent justification in Massachusetts when it placed the responsibility for publication of final rules on the agencies under its original comprehensive administrative procedure act in 1954. Massachusetts rejected central compilation, publication and distribution along the lines of the federal system, "reflecting the view that a less elaborate and less expensive approach should be tried first."¹¹³ Experience did not justify reliance on the agencies. Non-compliance was common,¹¹⁴ and today Massachusetts requires centralized publication for administrative rules.¹¹⁵

The burdens and obstacles which are created by fragmented distribution of the obligations of public notice among the agencies can be reduced considerably by designation of a single person or institution as the repository or conduit for matters requiring public notice. Increasingly, comprehensive state administrative procedure acts have included provisions of this kind.¹¹⁶ In West Virginia

¹¹² See Moreland, *State Administrative Rules and Regulations*, 21 MICH. ST. B.J. 22 (1942).

¹¹³ Curran and Sacks, *The Massachusetts Administrative Procedure Act*, 37 Bos. U.L. REV. 70, 83-84 (1957).

¹¹⁴ O'Leary, *The Right to Be Informed*, 54 MASS. L.Q., 63, 69-71 (1969).

¹¹⁵ MASS. GEN. LAWS ANN. ch. 30A, § 6 (1973).

¹¹⁶ ALASKA STAT. §§ 44.62.130, .140, .160 (1962); CAL. STATE GOV'T. CODE ANN. § 11409 (Supp. 1977); COLO. REV. STAT. § 24-4-103 (11) (1973); CONN. GEN. STAT.

the Office of the Secretary of State has been assigned this pivotal role in the rule-making process.

1. The Secretary of State as Repository

The 1964 Act required agencies to file final rules with the Secretary of State, a requirement which extended to all rules in effect on July 1, 1964, the Act's effective date, as well as to any adopted thereafter. To facilitate performance of this major task, the Secretary of State was charged with the responsibility for promulgating his own rules, prescribing a standard size, format and numbering system for agency rules, and for refusing to accept any which failed to comply.¹¹⁷ This compilation of agency rules, once established and subsequently expanded upon the filing of new rules, was intended to provide a permanent register for all rules required to be filed with the Secretary of State. Its creation and maintenance was his responsibility, and the Act required further that the permanent register be made available for public inspection during office hours of the Secretary.¹¹⁸

The permanent register has obvious merit. In a single location one can determine the existence and nature of agency rules required to be filed, secure in the knowledge that this is where they must be. This was not, however, the only possible source of infor-

ANN. § 4-173 (Supp. 1977); FLA. STAT. ANN. § 120.55 (Supp. 1977); GA. CODE ANN. § 3A-107 (1975); IND. CODE ANN. §§ 4-22-2-7 to -9 (1974); IOWA CODE ANN. § 17A.6 (Supp. 1977); KAN. STAT. §§ 77-427, -430 (Supp. 1976); KY. REV. STAT. § 13.096 (Supp. 1976); LA. REV. STAT. § 49:954.1 (Supp. 1977); ME. REV. STAT. tit. 5, § 2353 (1964); MD. ANN. CODE art. 41, § 256C (Supp. 1976); MASS. ANN. LAWS ch. 30A, § 6 (1973); MICH. STAT. ANN. § 3.560 (146) (Supp. 1977); MINN. STAT. ANN. § 15.051 (1977); MISS. CODE ANN. § 25-43-11 (Supp. 1977); MO. ANN. STAT. § 536.031 (Supp. 1977); MONT. REV. CODES ANN. § 82-4206 (Supp. 1975); N.H. REV. STAT. ANN. § 541-A:5 (Supp. 1973); N.J. STAT. ANN. § 52: 14B-7 (Supp. 1976); N.M. STAT. ANN. § 4-32-6 (1974); N.Y. EXEC. LAWS § 160 (McKinney Supp. 1975); N.C. GEN. STAT. § 150A-63 (Supp. 1975); OKLA. STAT. ANN. tit. 75, §§ 255, 256 (1976); OR. REV. STAT. § 183.360 (1975); PA. STAT. ANN. tit. 45, §§ 701-702 (Special Pamphlet 1977); R.I. GEN. LAWS § 42-35-5 (1969); S.C. CODE §§ 1-16, -17 (1962); S.D. COMPILED LAWS ANN. § 1-26A-1 (Supp. 1977); TENN. CODE ANN. § 4-502 (Supp. 1976); TEX. REV. CIV. STAT. ANN. art. 6252-13a, § 6 (Supp. 1976); UTAH CODE ANN. § 63-46-7 (Supp. 1977); VT. STAT. ANN. tit. 3, §§ 804, 805 (Supp. 1977); VA. CODE § 9-6.19 (Supp. 1976); WASH. REV. CODE § 34.04.050 (1967); WIS. STAT. ANN. § 35.93 (West Supp. 1977); WYO. STAT. § 9-276.23 (Supp. 1975). The laws of the District of Columbia and Puerto Rico have similar provisions. D.C. CODE ANN. §§ 1-1504, 1507, 1602 (Supp. III 1976); P.R. LAWS ANN. tit. 3, § 1054 (1965).

: ¹¹⁷ W. VA. CODE ANN. § 29A-2-1(b) (1976 Replacement Vol.).

¹¹⁸ *Id.* § 29A-2-1(a).

mation on final rules. Although not required under the Act, many agencies made available copies of their rules and regulations. The practice was a sound and useful one, but a pamphlet of agency rules dated five or ten years ago should be regarded with suspicion.¹¹⁹ Reliance on such a pamphlet would be foolhardy because agencies were not required to make the final rules available, much less current. The permanent register makes possible a determination of precisely what the agency rules are at any particular moment.

The disadvantage in the permanent register is its presumption of ready and equal access. What is relatively convenient for one in Charleston may be totally inaccessible as a practical matter to one in other areas of the state.

Under the 1976 Amendments the concept of a permanent register is retained and its content enlarged. The Secretary of State is required to establish and maintain a state register, the purpose of which is to provide "a compilation of the rules and regulations of the various agencies, and . . . notice of proposed rules or regulations or the taking of evidence with respect thereto . . ."¹²⁰ Thus, the state register must contain not only final rules as previously required of the permanent register, but also proposed rules, notices and statements of findings and determinations condition precedent to rule making and related matters arising out of the legislative review process. The "form and fashion" of the new register are within the discretion of the Secretary of State; its existence and maintenance are not.¹²¹

Since the Secretary of State is obligated by law to duplicate the state register and furnish it and weekly supplements on a subscription basis,¹²² the role of the Secretary today is less that of a repository and more that of a clearing and publishing house for public notice at key stages in the rule-making process. The permanent register in the Secretary of State's office nevertheless may be

¹¹⁹ For example, the Public Service Commission of West Virginia has published and made available a pamphlet on its "Rules of Practice and Procedure - Rules and Regulations for the Government of the Construction and Filing of Tariffs of Public Utilities and Common Carriers." The pamphlet is dated January 2, 1969. The Public Service Commission of West Virginia published subsequent rules on an individual basis. On March 1, 1977, the Commission published new pamphlets containing new and revised rules on the above and other subjects.

¹²⁰ W. VA. CODE ANN. § 29A-3-4 (1976 Replacement Vol.).

¹²¹ *Id.*

¹²² *Id.*

of importance in limited situations. For example, assume that an administrative agency is about to publish a notice of proposed rule making. One of those who expects to be affected by the rule, if adopted as proposed, is an industrial firm which knows generally what the agency is likely to propose and that the proposal is not likely to be favorable to its interests. Here, early knowledge of the precise terms of the proposal may put the firm in a better position to respond to inquiries from the media and investors, and, for a variety of reasons, the agency may be unable or unwilling to give the firm advance notice of its proposal. Here, the firm has a choice between waiting for publication of the weekly supplement to the state register or, if it desires, checking for filings in the state register on a daily basis at the Secretary of State's Office. Similar needs could arise in connection with a final rule or any other item required to be filed in the state register. The permanent register provides a means for obtaining the earliest possible official notice of rule-making activities.¹²³

2. The Secretary of State as Publisher

Realistic and meaningful public notice, participation and compliance with regard to administrative rules are assured primarily through the publishing responsibilities of the Secretary of State. In comparison, his role as repository is incidental. The importance of effective distribution and dissemination of rule-making information was recognized in the 1964 Act, at least with respect to final rules. To that end the Legislature assigned specific duties to the Secretary of State.

The Secretary of State was instructed to publish, "as soon as practicable" after January 1, 1965, "as to each agency, in pamphlet form, all rules adopted by such agency and on file in his office."¹²⁴ This represents a natural and logical extension of the agencies' obligation to compile and index all rules and regulations in force on July 1, 1964, and file them with the Secretary of State by January 1, 1965. Once the agencies had met their responsibility, the burden shifted to the Secretary to publish all filed rules and regulations. The language of the statute suggests that the Legisla-

¹²³ This is not merely a hypothetical use. The author on numerous occasions in the course of representing commercial interests consulted the Office of the Federal Register to determine the content of regulations "on display" and not yet published.

¹²⁴ Acts of the 56th W. Va. Leg. ch. 1, § 29A-3-7 (a), Reg. Sess. [1964] (amended and reenacted 1976).

ture envisioned a series of pamphlets, one for each agency, to be "supplemented or revised as often as necessary."¹²⁵

The Secretary of State also was instructed "to publish a quarterly bulletin in which he shall set forth the text of all rules filed during the preceeding quarter . . ." with the exception of rules in effect on January 1, 1965.¹²⁶ This was natural and logical because it assured general availability of a relatively current compilation of final agency rules. Both the initial publications and quarterly bulletins were required to be made available to the public for a charge representing publishing and mailing costs.¹²⁷

From the standpoint of the public these publications offered to guarantee that their contents would accurately depict the status of an agency's rules at any time after their date of publication. There would have been an element of risk in assuming that the rules presented in the Secretary of State's publications were current because bulletins were to be published only quarterly, but new rules could be expected to be filed daily with the Secretary of State. From this, it does not follow that the publications were nothing more than a convenient service, gratuitously made available to the public. These publications were integral to the Legislature's overall design for public notice of agency rules.

Publication, as required of the Secretary of State, under the 1964 Act, would have the effect of reducing the need for reliance on inspection of the permanent register in order to ascertain an agency's current rules. A member of the public first would examine the appropriate published pamphlets and quarterly bulletins. This task would not be restricted to one office in one city. The permanent register in the Secretary of State's Office would need to be consulted only to update the most recent quarterly bulletin. The need to update the bulletin through examination of the permanent register would be less for persons having sufficient interest in the activities of a particular agency to request personal notice of proposed rule making than for persons not requesting such notice. Aware of the current rule-making activities of the agency, these persons would be in a position to assess the likelihood of a final rule affecting them having been filed since publication of the last quarterly bulletin.

¹²⁵ *Id.*

¹²⁶ *Id.* § 29A-3-7(b).

¹²⁷ *Id.* § 29A-3-7(d).

In anticipation of a question which is perhaps implicit in this discussion and which is answered in detail elsewhere in this article,¹²⁸ there is little justification for the argument that the intricacies of notice as maintained and published by the Secretary of State are of less concern because the same information is available from the agencies themselves. For the moment it is sufficient to say that it is to the Secretary of State and not to the agencies that the Legislature directed the public for information on final rules.

The Legislature was not unmindful of the magnitude of the task given the Secretary of State. While the agencies were required to file their compilations and indices by January 1, 1965, or have rules not filed declared invalid,¹²⁹ the Legislature was more solicitous toward the Secretary of State and instructed that the pamphlets be published only "as soon as practicable"¹³⁰ after that date. There is room for wonder, however, whether the passage of over eleven years without publication of anything whatsoever by the Office of the Secretary of State under the 1964 Act bears any reasonable relationship to practicability, one way or the other.

The 1976 Amendments prescribed the manner and time in which the Secretary of State was to implement the new state register. The legislative mandate required the Secretary to arrange all rules on file in a volume or record within ninety days of June 7, 1976, the effective date of the Amendments, and to add to this state register on a continuing basis the various matters required by law to be filed in it.¹³¹ All of the materials essential to this effort were on file with and under the control of the Secretary; therefore, the Legislature elected not to impose any affirmative obligations on the agencies in connection with preparation of the state register. The state register, once prepared, and the weekly supplements thereto were to be made available on a subscription basis to anyone applying, at a cost fixed by the Secretary and reflecting the expenses of preparation and distribution.¹³² The amendments also gave

¹²⁸ See generally text accompanying notes 228-59 *infra*.

¹²⁹ W. VA. CODE ANN. § 29A-2-1(a) (1976 Replacement Vol.).

¹³⁰ Acts of the 56th W. Va. Leg. ch. 1, § 29A-3-7(a) [1964] (amended and reenacted 1976).

¹³¹ W. VA. CODE ANN. § 29A-3-4 (1976 Replacement Vol.).

¹³² W. VA. CODE ANN. § 29A-3-4 (1976 Replacement Vol.). A subscription price determined on this basis may be prohibitively expensive. Pennsylvania concluded that some subsidy was essential and makes its Bulletin available for nine dollars per year and its administrative Code for twenty-nine dollars. In 1972, the Bulletin had a paid circulation of 15,000, including 8,500 nongovernment subscriptions.

the Secretary of State the responsibility for publishing permanent volumes of final agency rules "from time to time but at least biennially."¹³³ Thus, the Legislature provided under the 1976 Amendments for a comprehensive system of published documents on developments in agency rule making.

This system with a state register, kept current through weekly supplements and complemented by reasonably current permanent volumes containing final rules, has its advantages and disadvantages. First, it has the effect of funneling information on various stages in the rule-making process through a single institution, the Office of the Secretary of State. A single, centralized source of this information reduces the burdens on the public significantly and reduces the extent to which agencies must devote time and effort to notifying the public. Second, the Secretary of State is required to serve as a conduit as well as a repository for this information. His affirmative duty to publish this information and make it accessible increases its availability to all in West Virginia. From this it seems reasonable to expect the state register to improve the quantity and quality of public notice, participation and compliance with respect to agency rule making. The disadvantage and risk in the new state register system lies in its vulnerability to total breakdown. If an individual agency fails to meet its responsibilities, the consequences, although serious, are limited to that agency and its rule-making activities. But similar failure at the level of the Office of the Secretary of State has far-reaching impact. Unfortunately, theoretical risk has become reality. At the time of this writing, months after the deadline for initial compilation and publication of the state register, it still is not available although all the materials essential to this effort were on file with and under the control of the Secretary within the prescribed time period.¹³⁴

With respect to the Code, 2,900 had been sold, 1,200 of which were to those outside government. Zeiter, *Pennsylvania General Rules of Practice and Procedure - A Surprising By-Product of a State Register System*, 24 AD. L. REV. 275, 283-84 (1972).

¹³³ W. VA. CODE ANN. § 29A-3-4 (1976 Replacement Vol.).

¹³⁴ The current Secretary of State, A. James Manchin, who took office in January, 1977, has indicated that his office is working diligently on the matter and expects to publish the register at the earliest date possible. During the summer of 1977, the Secretary did begin making proposed rules then being filed with him available on a subscription basis. See Neely, *The 1976 Amendments to the West Virginia Administrative Procedure Act*, W. VA. B.A. AD. L. SEC. BULL. (July, 1977).

C. Responsibilities of the Legislature

A common concern among legislative bodies is how to maintain control and supervisory power over administrative agencies and especially over those whose existence and authority stems directly from the legislatures. That the demands of effective and efficient government may recommend and, perhaps, even compel creation of administrative bodies and delegation of basic powers of government to them, need represent neither a corresponding abdication of legislative responsibility nor an end to legislative interest in an area. What normally develops is a keen awareness within the legislative body of its duty to attempt to control that which it has created.

The techniques employed by legislatures to exercise control and supervision over administrative action are numerous and varied. Legislative powers over appropriations, standing and watchdog committees, investigations, intercession in pending matters and, in some instances, participation in the appointment of administrative officials are means by which legislatures intervene in the administrative process.¹³⁵ Central to the legislature's ability to control and supervise administrative action is its fundamental legislative power. Powers which the legislature may confer may be withdrawn or reshaped by repeal or amendment of statutory law.¹³⁶ Implicit in the activities of a legislative standing committee is the possibility that an agency, unmindful of and unresponsive to the will of the legislature, may be brought to task by enactment of new legislation with the express object of reversing the course currently pursued by the agency.

Before amendment of the West Virginia Administrative Procedure Act in 1976, the West Virginia Legislature had at its disposal these more traditional means of control over administrative action. The 1976 Amendments establish new procedures for legislative review of agency rules and regulations, the effect of which is

¹³⁵ See Boisvert, *A Legislative Tool for Supervision of Administrative Agencies: The Laying System*, 25 *FORDHAM L. REV.* 638, 666 (1956-57); [hereinafter cited as Boisvert]; Herwitz and Mulligan, *The Legislative Investigating Committee*, 33 *COLUM. L. REV.* 1 (1933); Melville, *Legislative Control Over Administrative Rule Making*, 32 *U. CIN. L. REV.* 33, 35-37 (1963) [hereinafter cited as Melville]; Newman and Keaton, *Congress and the Faithful Execution of the Laws - Should Legislators Supervise Administrators?*, 41 *CALIF. L. REV.* 565, 567-70 (1953); Schwartz, *supra* note 13, at 521-22.

¹³⁶ See Kinnane, *Administrative Law: Some Observations on Separation of Powers*, 38 *A.B.A.J.* 19, 22 (1952); Melville, *supra* note 135, at 35-37.

to bring the Legislature into the rule-making process on a more formal, direct and continuing basis.

Provision for legislative review of agency rules is not unprecedented. For some time British statutes conferring rule-making authority have on occasion required that, before becoming effective, rules must be laid before Parliament for affirmative approval. More often British statutes have allowed administrative rules to become effective, subject to the proviso that they may be annulled by resolution of either House of Parliament within a certain period of time.¹³⁷ There is no general counterpart to the British system of laying rules before Congress;¹³⁸ however, a minority of states do provide some form of legislative review of rules. Their number, which now includes West Virginia, has been increasing, perhaps revealing some disenchantment with traditional techniques as effective and adequate means for control of administrative action.¹³⁹

1. The Legislative Rule-making Review Committee of the West Virginia Legislature

For the purpose of undertaking legislative review of agency rules on a continuing basis, the 1976 Amendments provide for a new "statutory body to be known as the legislative rule-making review committee."¹⁴⁰ The task assigned to the Committee is the "review [of] all rules or regulations of the several agencies follow-

¹³⁷ Note, 65 HARV. L. REV. 637, 637-38 (1952); *See generally* COOPER, *supra* note 30, at 222-24; Boisvert, *supra* note 135, at 638-50; Melville, *supra* note 135, at 38-43; Stewart, *Constitutionality of the Legislative Veto*, 13 HARV. J. LEG. 593 (1976).

¹³⁸ *See* SCHWARTZ, *supra* note 12 at 181-82. Note, *Congressional Veto Of Administrative Action: The Probable Response to A Constitutional Challenge*, 1976 DUKE L.J. 285, 286-87 (1976).

¹³⁹ ALASKA STAT. § 44.62.320 (1962); ARK. STAT. ANN. §§ 6-610 to -612 (1976); CONN. GEN. STAT. REV. § 4-170, -171 (West Supp. 1976); FLA. STAT. ANN. §§ 11.60, 120.54 (Supp. 1976); IDAHO CODE ANN. §§ 67-5217, -5218 (Supp. 1976); IOWA CODE ANN. §§ 17A.4(4), .8 (West Supp. 1977); KAN. STAT. ANN. § 77-426 (Supp. 1976); KY. REV. STAT. ANN. §§ 13.085, .087 (Supp. 1976); MD. ANN. CODE art. 40, § 40A (Supp. 1976); MICH. STAT. ANN. §§ 3.560(135), (145) (Supp. 1977); MINN. STAT. ANN. § 3.965 (West 1977); MO. ANN. STAT. § 536.037 (Supp. 1976); MONT. REV. CODES ANN. § 82.4203.1-.5 (Supp. 1977); NEB. REV. STAT. §§ 84-904, -908 (Cum. Supp. 1976); OKLA. STAT. ANN. tit. 75, § 308 (1976); OR. REV. STAT. §§ 171.707-.713 (1975); S.D. COMPILED LAWS ANN. § 1-26-1.1 (Supp. 1977); VT. STAT. ANN. tit. 3, §§ 817-819 (Supp. 1977); WASH. REV. CODE ANN. § 34.04.160 (1965); W. VA. CODE ANN. §§ 29A-3-11, -12 (1976 Replacement Vol.); WIS. REV. STAT. §§ 13.56, .565 (West Supp. 1977); *cf.* THE BOOK OF STATES 64-65 (1974-75).

¹⁴⁰ W. VA. CODE ANN. § 29A-3-11(a) (1976 Replacement Vol.).

ing the proposal thereof.”¹⁴¹ The effect is to require legislative review of the bulk of proposed rules, the exception being agency “rules of procedure, practice or evidence for dealings with or proceedings before the agency.”¹⁴² Legislative review is not applicable to rule-making activities otherwise exempt by virtue of the subject matter or the initiating institution.¹⁴³

The Legislative Rule-making Review Committee is bipartisan and consists of twelve legislators, six from the Senate and the House of Delegates respectively, but not more than four of the six may be of the same political party. The President of the Senate and Speaker of the House, who are *ex officio* nonvoting members, designate the co-chairmen of the Committee and appoint committee members from their respective houses.¹⁴⁴ The new law provides for compensation and expenses of committee members as well as for “those incurred in the employment of legal, technical, investigative, clerical, stenographic, advisory, and other personnel.”¹⁴⁵ The latter provision is significant because it indicates an appreciation of the necessity for adequate supporting services in the discharge of the Committee’s responsibilities. The provision for meetings upon call of the co-chairmen “at any time, both during sessions of the legislature and in the interim” indicates the continuing nature of these responsibilities.¹⁴⁶

The 1976 Amendments confer extraordinary powers upon the Legislative Rule-making Review Committee. Most other states which rely on special legislative committees in the review process have given them considerably lesser roles. In several states the committee’s principal function is the review of agency rules for the purpose of making recommendations to the legislature for further action,¹⁴⁷ although in some states there is also emphasis on transmitting committee objections to the agency promulgating the rule.¹⁴⁸ In these jurisdictions the committees views are without

¹⁴¹ *Id.*

¹⁴² W. VA. CODE ANN. §§ 29A-3-7(a), -11(b) (1976 Replacement Vol.).

¹⁴³ See generally text accompanying notes 25-26 *supra*.

¹⁴⁴ W. VA. CODE ANN. § 29A-3-11(a) (1976 Replacement Vol.).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ MD. ANN. CODE art. 40, § 40A (Supp. 1976); MO. ANN. STAT. § 536.037 (Supp. 1976); NEB. REV. STAT. § 84-904 (2) (Cum. Supp. 1976); ORE. REV. STAT. §§ 171.707, .713 (1975); S.D. COMPILED LAWS ANN. § 1-26-1.1 (Supp. 1977); WASH. REV. CODE ANN. § 34.04.160 (1965).

¹⁴⁸ ARK. STAT. ANN. § 6-610 (1976); KY. REV. STAT. §§ 13.087(4) - (7) (Supp. 1976); VT. STAT. ANN. tit. 3, §§ 818, 819 (Supp. 1977).

independent effect, absent further legislative action. The situation is similar in Florida, but if any agency adopts its rule over the objection and disapproval of the Florida Administrative Procedures Committee, the fact is recorded as a historical note to the rule in the Florida Administrative Code.¹⁴⁹ In Iowa something more than a footnote is at stake for the agency which proceeds over the objection of the Administrative Rules Review Committee; the agency bears the burden of proof to sustain the validity of its rule in any proceeding for its judicial review or enforcement.¹⁵⁰ In a few states committee action on a rule may bring about a temporary suspension, but even there further legislative action is required for lasting impact on agency rules.¹⁵¹ Submission of a proposed rule to the Committee in West Virginia is neither for informational purposes alone nor for formulation of recommendations. More is involved than a temporary suspension of the rule. In West Virginia submission is for the purpose of legislative approval.¹⁵² With few exceptions a rule cannot become effective until Committee approval is forthcoming, although failure of the Committee to act within one hundred eighty days of submission of a proposal to it is deemed approval of the rule.¹⁵³ Connecticut is the only other jurisdiction with a legislative review committee having comparable authority. The similarity is not unexpected, since the Connecticut statutory provisions for legislative review provided a model for the West Virginia Legislature.¹⁵⁴

Solely from the point of view of a legislature desiring more effective control over agency rule making, the role and powers given the Legislative Rule-making Review Committee seem desirable and advantageous. Yet there is an important distinction between this Committee and most other forms of legislative control over administrative action. In most instances, legislative controls are not as direct in nature as here. A watchdog committee, for example, may conclude after investigation and public hearings that the direction in which an agency is proceeding is improper, unwise or both. To remedy this, new legislation may result, but, in the interim, the agency is entitled to continue on its course.

¹⁴⁹ FLA. STAT. ANN. §§ 120.54(13), 11.60(2)(e) (Supp. 1976).

¹⁵⁰ IOWA CODE ANN. § 17A.4.4(a) (West 1977).

¹⁵¹ MICH. STAT. ANN. § 3.560 (145) (1977); MINN. STAT. ANN. § 3.965 (1977); WIS. STAT. ANN. § 13.56 (1977).

¹⁵² W. VA. CODE ANN. § 29A-3-11(b) (1976 Replacement Vol.).

¹⁵³ *Id.*

¹⁵⁴ CONN. GEN. STAT. ANN. § 4-170 (West Supp. 1976).

Should the attention of the watchdog committee be diverted to another issue, the normal conduct of agency business proceeds apace, impeded only by the possibility of future legislative action. West Virginia's type of legislative review would avert such a situation, which is one of its advantages. What must not go unnoticed is that this is achieved only by introducing legislative review directly into the rule-making process. Legislative review in West Virginia is not simply another mechanism for control of the rule-making process; rather it is part of the process itself.

The Legislative Rule-making Review Committee has atypical and extraordinary responsibilities. Only if these are met in satisfactory fashion can there be any possibility of effective and expeditious functioning of the process. Whether they will be met must await experience with the Committee, although there is every indication that at present it is fully aware of the significance of its responsibilities. Some observations are possible and seem justified at this time. These may be of some usefulness in establishing the legal and practical boundaries within which the Committee should act.

The attention which the Committee can be expected to devote to individual rules will vary, but something more than a cursory examination is intended. The statute requires the Committee to study all proposed rules submitted to it.¹⁵⁵ Reasoned and refined judgments are within the Committee's ability since it is not confined to the absolutes of approval or disapproval but is entitled to approve in part and/or disapprove in part any rule, and one hundred eighty days is a great deal of time in which to make such judgments. To assist in these efforts the Committee has discretionary authority to hold public hearings on proposed rules.¹⁵⁶ All of these factors indicate that more than *pro forma* ratification of agency proposals is expected of the Committee. The statute creating the Committee takes into account the burden of meaningful review in its reference to supporting staff and services.¹⁵⁷ A realistic appraisal of the task before it should cause the Committee to exercise the option to obtain support to the extent necessary. Committee review need not be deficient for want of effort; however, the Legislature was perhaps overly generous in providing for a one

¹⁵⁵ W. VA. CODE ANN. § 29A-3-11(b) (1976 Replacement Vol.).

¹⁵⁶ *Id.*

¹⁵⁷ W. VA. CODE ANN. § 29A-3-11(a) (1976 Replacement Vol.).

hundred eighty day limit for Committee action.¹⁵⁸ Even in Connecticut the Legislative Review Committee is allowed only sixty-five days in which to act.¹⁵⁹ The one hundred eighty day limit on Committee action on a proposed rule could result in unreasonable delay in the development of agency policy through rules. How much time is necessary and reasonable will depend on many factors, varying from rule to rule. A sensible approach would be for the Committee to complete its review as expeditiously as possible in each instance in a manner consistent with its basic responsibilities.

Avoidance of undue delay in legislative review will permit the rule-making process to proceed with minimal interference, thus disarming to a degree the critic who views legislative review as a drain on administrative efficiency.¹⁶⁰ This path also reduces risks which might otherwise accompany undue delay. First, there is the risk that an agency will seek to avoid the process by refusing to make rules or by making rules and calling them something else. In either case the results would be unfortunate. Development and implementation of certain kinds of policy are particularly suitable for rule making, but no policy at all may be an attractive alternative to some agencies. Undue delay might encourage recourse to the no policy approach. An agency which goes "underground," making rules under the guise of something different, deprives the public of its rights to notice and participation. Surreptitious rule making may prove difficult to detect and thus less likely to be brought to task. Second, an agency distressed by undue delay, may be tempted to rely on emergency rule making in situations where true emergency conditions are lacking.¹⁶¹ Experience indicates that the risk is more than theoretical. At one time in Michigan normal rule-making procedures could be avoided upon certification by the Governor of existence of an emergency. The customary practice developed of characterizing almost every rule an "emergency rule."¹⁶² While this course serves only to defer, rather than to eliminate legislative review, it also delays public notice and participation. The advantages of an orderly rule-making process justifies

¹⁵⁸ W. VA. CODE ANN. § 29A-3-11(b) (1976 Replacement Vol.).

¹⁵⁹ CONN. GEN. STAT. ANN. § 4-170 (West Supp. 1977).

¹⁶⁰ Cf. Note, *Can The Joint Administrative Procedures Committee Adequately Solve Administrative Conflict*, 4 FLA. ST. U. L. REV. 350, 361-63 (1976).

¹⁶¹ Note, *Rulemaking and Adjudication Under the Florida Administrative Procedure Act*, 27 U. FLA. L. REV. 755 (1975).

¹⁶² COOPER, *supra* note 30, at 201-02.

reducing the temptation wherever possible, and prompt legislative review is one way of accomplishing this.

Another Committee responsibility which deserves careful consideration is the scope of legislative review. The nature and extent of the Committee's inquiry concerning a proposed rule will have an effect on the speed and efficiency of review; however, no standard concerning the scope of legislative review appears in the statute. The only general conclusion supported by the language itself is that it is intended that the committee's inquiry be substantial. Some state legislatures have attempted to structure legislative review activities by indicating matters appropriate to form the basis for legislative review actions or recommendations. The most frequent expression concerning the scope of legislative review involves a determination of whether the administrative rule is contrary to legislative intent.¹⁶³ Others include an additional criterion of whether the rule exceeds the authority delegated to the agency,¹⁶⁴ and a few expressly include a determination of the arbitrary,¹⁶⁵ or arbitrary or capricious nature of the rule.¹⁶⁶

Another relevant consideration in determining the proper scope of the Committee's inquiry is the role of the judiciary with respect to agency rules. Since 1964 the Act has provided for declaratory judgment actions to determine the validity of final agency rules.¹⁶⁷ Persons are entitled to initiate a declaratory judgment proceeding "when it appears that the rule, or its threatened application, interferes with or impairs or threatens to interfere with or impair, the legal rights or privileges of the plaintiff or plaintiffs."¹⁶⁸ In a declaratory judgment proceeding, the statute provides that the court declare a rule invalid if it finds that the rule violates constitutional provisions, exceeds the statutory authority or jurisdiction of the agency, was adopted without compliance with statutory rule-making procedures, is arbitrary or

¹⁶³ ARK. STAT. ANN. § 6-610 (1976 Replacement Vol.); IDAHO CODE ANN. § 67-5218 (Supp. 1977); KY. REV. STAT. § 13.087(4) (Supp. 1976); OR. REV. STAT. § 171.709(3) (1975); VT. STAT. ANN. tit. 3, § 818(c) (Supp. 1977); WASH. REV. CODE ANN. § 34.04.160 (1965).

¹⁶⁴ IOWA CODE ANN. § 17A.4. a. (Supp. 1977-1978); KY. REV. STAT. § 13.087(4) (Supp. 1976); ORE. REV. STAT. § 171.709(3) (1975); VT. STAT. ANN. tit. 3, § 818(c) (Supp. 1977).

¹⁶⁵ VT. STAT. ANN. tit. 3, § 818(c) (Supp. 1977).

¹⁶⁶ IOWA CODE ANN. § 17A.4. a (Supp. 1977-1978).

¹⁶⁷ Acts of the 56th W. Va. Leg. ch. 1, § 29A-4-2, Reg. Sess. [1964] (*codified at W. VA. CODE ANN. § 29A-4-2* (1976 Replacement Vol.)).

¹⁶⁸ W. VA. CODE ANN. § 29A-4-2(a) (1976 Replacement Vol.).

capricious, or is based on emergency rule-making procedures without justification.¹⁶⁹ It would not be surprising for any of these issues to arise in the course of legislative review of a proposed rule. This potential for overlap between the scope of judicial and legislative review may be of significance to the issue of whether legislative review violates the doctrine of separation of powers in that it usurps judicial functions.

There would be substantial merit in development of some general statement of the scope of legislative review to be employed by the Legislative Rule-making Review Committee. This could be accomplished by statutory amendment, but there is no reason why the Committee itself could not issue its own general guidelines indicating how it intends to define the scope of its review of agency proposals. It might, for example, announce its intention to review proposed rules to determine their conformity with general legislative intent. It might extend its review to questions of whether statutory authority has been exceeded, although to do so would exacerbate the problem of overlap with judicial functions. Both techniques are consistent with the general approach adopted in those states which have focused on the scope of review issue. On the other hand, the Committee might indicate its intention not to review proposals on constitutional grounds and leave this traditionally judicial function to the courts. To the extent that the review process is vulnerable to constitutional challenge, such action on the part of the Committee could serve to reduce the risk of a finding of unconstitutionality of the legislative review process.

The technique of Committee pronouncement of its intentions should be considered with respect to the issue of its procedures.¹⁷⁰ As an integral component in the rule-making process, the Committee probably can expect constant and sometimes intense pressure from both the agencies and the public. General guidelines concerning what the Committee expects of the agencies could simplify the Committee's task and make the process more orderly. Guidelines made known to the public concerning the circumstances under which the Committee will be inclined to exercise its discretion to hold a public hearing on a rule would also be useful.¹⁷¹ Guidelines

¹⁶⁹ *Id.* § 29A-4-2(b).

¹⁷⁰ For example, some years ago the legislative review committee in Michigan "adopted its own rules for hearings on complaints arising out of agencies." Smith and Sharkoff, *Legislative Review of Administrative Regulation*, 29 MICH. ST. B. J., No. 8, 29, 30 (Aug. 1950).

¹⁷¹ W. VA. CODE ANN. § 29A-3-11(b) (1976 Replacement Vol.).

on how such hearings are to be conducted could be of substantial benefit to settling the expectations of the agencies and the public. To nurture understanding that the hearing is only a legislative hearing, unconfined by the requirements of notice and an opportunity to be heard applicable in adjudicatory proceedings, could do much to alleviate the clamor likely to arise from those persons accustomed to the latter.

No matter what the substantive and procedural qualities of legislative review, whether imposed by statute or voluntarily by the Committee, the underlying theme of legislative review is political review of agency rules. Some might view the process as undesirable for that very reason, or urge that institutions such as the Committee conduct their affairs "above politics." The fact remains that political review exists, and, properly so, regardless of whether it is formal or informal in nature. Yet, formal review, especially where it is so much a part of the rule-making process as it is in West Virginia, does carry some added obligations. Without lecturing elected representatives on the resolution of political matters, a few observations may be useful to an appreciation of legislative review and its relationship to rule making. First, legislative review provides aggrieved persons another "bite at the apple," since they are afforded rights to participate in the rule-making process before the agency. This may be precisely the situation where legislative review is most needed, if the agency has acted without regard to legislative intent, but at the same time the Committee should be watchful for efforts to overturn in the Legislature that which was properly decided on the merits before the agency. Second, in many situations the very reason for which the agency was created was to provide decisions based on informed judgment and expertise. The Committee should consider carefully any action which has the effect of substituting its judgment for that of the agency on matters where informed judgment and expertise are essential. Finally, the Committee might do well to resist the understandable temptation to counsel an agency on how it could do what the Committee has concluded it could not do in the form of the proposed rule it has rejected. The affirmative duty to draft rules properly lies with the agency. If this were not the case, the need for having agencies at all would be questionable.

2. The Role of the Legislature with Respect to Actions of the Legislative Rule-making Review Committee

The 1976 Amendments provide for oversight by the full Legis-

lature with respect to actions of the Legislative Rule-making Review Committee. The Committee Co-chairmen are instructed to submit copies of all proposed rules considered by the Committee to their respective houses of the Legislature.¹⁷² In light of the statute's purposes, this requirement apparently would apply only to proposals considered and acted upon by the Committee and not those still pending. The copies must be submitted no later than thirty days before the end of each regular legislative session and referred to the appropriate standing committee in each house for consideration.¹⁷³ Orderly and efficient performance of the duties of the full Legislature would be facilitated by continuous submission of proposals to it on a regular basis as the Committee completes its work on individual proposals. If there should be any inclination to forward all proposals in a single package at the deadline in the hope that the attention of the Legislature will be diverted to the normal press of Legislative business toward the close of the session the temptation should be resisted on the premise that deliberate and informed decisions are preferable to ill-conceived and hasty ones.

A proposal which has received the Committee's approval is permitted to become effective shortly after approval, but simply because it is in effect does not mean it will stay in effect. Under the statute, the Legislature may sustain or reverse, in whole or in part, the action of the Committee on a rule. This is accomplished by concurrent resolution of the Legislature.¹⁷⁴ In this respect, the 1976 Amendments go beyond even the Connecticut system of legislative review which provides for submission of only those rules disapproved by the Legislative Regulation Review Committee to the full General Assembly, which in turn may sustain or reverse the Committee's disapproval by concurrent resolution.¹⁷⁵ The Legislature is not compelled to act at all, but the fact that it may, creates the possibility that rights and obligations under the rule will have a limited life expectancy. If the Legislature reverses Committee approval and thereby renders a final rule no longer effective, rights and obligations incurred while the rule was in effect should not be affected,¹⁷⁶ but as a practical matter the impact may still be disruptive.

¹⁷² W. VA. CODE ANN. § 29A-3-12 (1976 Replacement Vol.).

¹⁷³ *Id.*

¹⁷⁴ *Id.*

¹⁷⁵ CONN. GEN. STAT. ANN. § 4-171 (Supp. 1977).

¹⁷⁶ *Cf. Crank v. McLaughlin*, 125 W. Va. 126, 131, 23 S.E.2d 56, 59 (1942). This

Reversal of Committee approval, however, is likely to be rare, and there is no reason why the Legislature should not consider the impact of the reversal of a decision now represented by a final and effective rule in reaching its ultimate decision on the rule. Nor are the agencies powerless to take appropriate steps in anticipation of reversal by concurrent resolution. If, for example, a proposal is approved by the Committee only by a narrow margin and dissenters indicate their intention to pursue the matter in the full Legislature, the agency has the option of providing a later effective date for the rule. It does not appear that the possibility of reversal exists indefinitely. A fair reading of the statute suggests that the Legislature must act, if at all, during the regular session in which the proposal is submitted to it by the Committee. If the Legislature fails to act on an approved rule by the end of the session, legislative review is complete and the rule stands, subject to change only by means other than legislative review under the 1976 Amendments.

The procedure for proposed rules disapproved by the Committee is slightly more complicated. Upon referral of a rule which the Committee has disapproved, in whole or in part, to the appropriate standing committee of the Legislature, the standing committee is required to schedule hearings on the rule. As with approved proposals, the Legislature is not required to sustain or reverse the committee on disapproved rules. Failure to act permits the committee's decision to stand, with one exception.¹⁷⁷ If the proposed rule is one designed to implement a federally subsidized or assisted program, the Legislature must sustain disapproval by concurrent resolution; otherwise its failure to act will be deemed a reversal of the Committee, and the proposed rule will become effective thirty days after the adjournment *sine die* of the regular session or later if the agency so chooses.¹⁷⁸ Generally legislative action on a rule by way of concurrent resolution is effective on the date of adoption of the resolution, provided the clerk of the house in which the resolu-

case indicates that "[n]o one has a vested right in any law or ordinance, in the sense that a continuance thereof may be demanded, although rights accruing thereunder are always protected up to the time of any repeal or modification thereof." The Oklahoma statute deals with the issue in providing that "[a]ny rights, privileges, or interests gained by any person by operation of an agency rule prior to its rejection or disapproval by either house of the Legislature, shall not be affected by reason of any subsequent disapproval or rejection . . ." OKLA. STAT. ANN. tit. 75, § 308(f) (1976).

¹⁷⁷ W. VA. CODE ANN. § 29A-3-12 (1976 Replacement Vol.).

¹⁷⁸ *Id.*

tion originated files forthwith a copy of the resolution in the state register and with the agency affected. This is not the case if the resolution makes effective a rule disapproved by the Committee. The resurrected rule becomes effective thirty days after filing of the resolution in the state register or on the effective date proposed by the agency, whichever is later.¹⁷⁹

Thus, the full Legislature as well as the Legislative Rule-making Review Committee is part of the rule-making process. As such, its action or inaction will bear considerably on the efficiency and effectiveness with which policy is developed and implemented through agency rules.

3. Legislative Review and Constitutional Issues

Formal programs for legislative review of administrative rules occasionally have been the subject of controversy for constitutional reasons. Normally, the concern lies not with what a legislature seeks to accomplish in the course of legislative review, but rather with how it accomplishes its objective. A legislature's right to enact legislation which overturns administrative rules and regulations is not likely to be questioned, but formal procedures for legislative review often reach the same result by means other than the ordinary. This is the source of much of the debate.

More than in any other system of legislative review in existence at this time, the various constitutional issues which have been of concern elsewhere are reflected in the West Virginia approach. Under the 1976 Amendments the Legislative Rule-making Review Committee possesses the power to veto proposed rules under its approval authority, although there is no definition of the intended scope of its review. The Committee's decisions in turn are subject to review by the full Legislature which may overturn a Committee decision of approval or disapproval of a rule by concurrent resolution. Most jurisdictions having formal legislative review have been much less ambitious. The majority allow the full legislature to overrule rules only by the traditional law-making means of statutory enactments, whether there is a preliminary committee review for the purpose of making recommendations, committee review with a power of temporary suspension, or no preliminary committee review at all.¹⁸⁰ Of those states which permit disapproval of

¹⁷⁹ *Id.*

¹⁸⁰ ARK. STAT. ANN. §§ 6-610, -612 (1976); FLA. STAT. ANN. § 11.60(2)(e) (Supp. 1976); IOWA CODE ANN. § 17A.8 (Supp. 1977); KAN. STAT. ANN. § 77-426 (Supp.

rules by either concurrent or joint resolution of the full legislature, most provide for review of only final rules, either by the legislature itself in the first instance, or after preliminary committee recommendations.¹⁸¹ Only West Virginia and Connecticut allow binding committee approval or disapproval of proposed rules, which is final unless the full legislature acts by concurrent resolution.¹⁸² Michigan is the only other state which confers powers of this magnitude, but even there committee disapproval results only in suspension of the rule, pending introduction and passage of a concurrent resolution in the full legislature. If the disapproval is not sustained, the rule stands.¹⁸³

The relatively cautious approach represented in so many of these jurisdictions may reflect to some degree concern over how far legislative review might extend and remain invulnerable to constitutional challenge. The experience in Wisconsin and Michigan and to a lesser extent in New Hampshire is instructive. When Wisconsin enacted a statute in 1953 providing for legislative disapproval of final agency rules by joint resolution of the legislature, the Wisconsin Attorney General declared the law violative of a constitutional provision which provided that "no law shall be enacted except by bill."¹⁸⁴ Today, rules may be overturned in Wisconsin only by statute.¹⁸⁵ Michigan once had a legislative review program which allowed abrogation of rules by legislative committee, pending reinstatement by the committee or by concurrent resolution of the legislature. In 1953 Michigan's Attorney General "declared the entire process of legislative review unconstitutional as a legislative encroachment on the functions of the judiciary."¹⁸⁶ Subsequently, the Michigan Constitution was amended to allow the committee

1976); KY. REV. STAT. ANN. § 13.087(9) (Supp. 1976); MD. ANN. CODE art. 40, § 40A (Supp. 1976); MINN. STAT. ANN. § 3.965(2) (Supp. 1977); MO. ANN. STAT. § 536.037.4 (Supp. 1976); NEB. REV. STAT. § 84-904(2) (Cum. Supp. 1976); ORE. REV. STAT. § 171.713 (1975); S.D. COMPILED LAWS ANN. § 1-26-1.1 (Supp. 1977); WASH. REV. CODE ANN. § 34.04.160 (1965); WIS. STAT. ANN. § 13.56(2) (Supp. 1977).

¹⁸¹ ALASKA STAT. § 44.62.320 (1976); IDAHO CODE ANN. § 67-5218 (Supp. 1977); MONT. REV. CODES ANN. § 82.4203.1(4) (Supp. 1975); OKLA. STAT. ANN. tit. 75, § 308 (1976); VT. STAT. ANN. tit. 3, § 819(c), (Supp. 1977).

¹⁸² CONN. GEN. STAT. REV. § 4-171 (Supp. 1976); W. VA. CODE ANN. § 29A-3-12 (1976 Replacement Vol.).

¹⁸³ MICH. STAT. ANN. § 3.560(145)(4)-(5) (Supp. 1977).

¹⁸⁴ COOPER, *supra* note 30, at 229; see Helstad, *supra* note 69, at 428.

¹⁸⁵ WIS. STAT. ANN. § 13.53 (Supp. 1977).

¹⁸⁶ COOPER, *supra* note 30, at 227; see Schubert, *Legislative Adjudication of Administrative Legislation*, 7 J. PUB. LAW 135, 157-58 (1958).

and concurrent resolution technique of legislative review.¹⁸⁷ In New Hampshire, in 1950, constitutional issues arose concerning a statute which gave the Governor authority to submit reorganization plans to the legislature which would become effective twenty-five days after submission, if the legislature did not reject the plan by concurrent resolution. The Governor requested an opinion of the New Hampshire Supreme Court, and the court declared the statute to be unconstitutional on grounds of departure from customary and constitutionally mandated law-making procedures.¹⁸⁸

Developments of this nature at the state level and selective but infrequent applications of legislative review principles by Congress have sparked controversy focused primarily on questions of constitutionality.¹⁸⁹ This has been particularly intense where legislative review includes a provision for action by concurrent resolution rather than by bill. The primary concern has been elimination of the executive's veto power when the power is inapplicable to concurrent resolutions.¹⁹⁰ It has been suggested that this does not in fact limit the control of the executive as a practical matter¹⁹¹ and that there is a legitimate need for legislative review which is constitutionally supportable.¹⁹² From these discussions, three general lines for inquiry emerge. First, does legislative review violate the concept of separation of powers by intruding upon the general prerogatives of the executive branch? Second, is the separation concept violated by intrusion upon the judicial function of deciding cases involving the legality of agency rules? Finally, does law making by concurrent resolution improperly deny the executive its veto power over legislation?

All of these questions are implicit in the form of legislative

¹⁸⁷ COOPER, *supra* note 30, at 227.

¹⁸⁸ Opinion of the Justices, 83 A.2d 738 (N.H. 1950).

¹⁸⁹ Cf. Boisvert, *supra* note 135; Grinnane, *The Control of Federal Administration by Congressional Resolutions and Committees*, 66 HARV. L. REV. 569 (1953); Melville, *supra* note 135; Schwartz, *supra* note 13; Watson, *Congress Steps Out: A Look at Congressional Control of the Executive*, 63 CALIF. L. REV. 983 (1975); Note, *Congressional Veto of Administrative Action: The Probable Response to Constitutional Challenge*, 1976 DUKE L.J. 285 (1976); Note, *Can The Joint Administrative Procedures Committee Adequately Solve Administrative Conflict*, 4 FLA. ST. L. REV. 350, 359-61 (1976); Note, 65 HARV. L. REV. 637, 646-48 (1952).

¹⁹⁰ See Grinnane, *supra* note 189, at 593-99.

¹⁹¹ See Boisvert, *supra* note 135, at 651-57.

¹⁹² See Melville, *supra* note 135, at 51-53; Schwartz, *supra* note 13, at 523, 533; Schwartz, *Legislative Control of Administrative Rules and Regulations: I. The American Experience*, 30 N.Y.U.L. REV. 1031, 1041-44 (1955).

review provided in the 1976 Amendments. No attempt is made to resolve them here because the primary purpose of this article relates to rights, responsibilities and procedures under the statute itself rather than its underlying constitutionality. Nevertheless, the basic issues in the context of West Virginia law merit brief consideration. No doubt their ultimate resolution must come from the Supreme Court of Appeals.

Historically the Supreme Court of Appeals has exhibited an inclination to preserve the separation of power between the branches of government. It has been persistent and aggressive to this end. In 1951, it was observed that "[o]ur court seems to take pride in the fact that it has in recent years, and contrary to the general trend, adopted a 'new and strict rule' concerning the separation of powers"¹⁹³ This did not occur without criticism. Professor Davis notes that "[w]hat is thought to be a perversion of the doctrine of separation of powers has culminated in a series of cases decided since 1931 which, it is believed, have quite unnecessarily held several important statutes unconstitutional and cast doubt upon the constitutionality of much existing legislation."¹⁹⁴ There is little doubt but that the court's acute sensitivity to preservation of separation of powers can be attributed to the express provision in the Constitution of West Virginia which provides that

[t]he legislative, executive and judicial departments shall be separate and distinct, so that neither shall exercise the powers properly belonging to either of the others; nor shall any person exercise the powers of more than one of them at the same time, except that justices of the peace shall be eligible to the legislature.¹⁹⁵

It appears that this attitude persists and that separation of powers is likely to be guarded carefully.¹⁹⁶ Should the Legislature disapprove an administrative rule, those wishing to see the rule sustained might do well to explore the matter and consider raising the issue in litigation.

The manner in which the Legislature is entitled to disapprove

¹⁹³ Colson, *Some Elementary Principles of Constitutional Law*, 53 W. VA. L. REV. 117, 119 (1950).

¹⁹⁴ Davis, *supra* note 16, at 272.

¹⁹⁵ W. VA. CONST. art. V, § 1.

¹⁹⁶ *State ex rel. Brotherton v. Blankenship*, 214 S.E.2d 467 (W. Va. 1975); *State ex rel. Canterbury v. County Court*, 151 W. Va. 1013, 158 S.E.2d 151 (1967); *see State ex rel. County Court v. Demus*, 148 W. Va. 398, 135 S.E.2d 449 (1964).

a rule under the 1976 Amendments also deserves consideration. Various provisions in the West Virginia Constitution address the proper form for exercise of legislative proceedings, the origination of bills, the reading of bills, their amendment and so forth.¹⁹⁷ The 1976 Amendments are silent on the applicability of these provisions to legislative action with respect to administrative rules, but if the Legislature acts on a rule in a manner inconsistent with these constitutional provisions, certainly the issue is presented of whether compliance with constitutionally mandated legislative procedure is required in this special case.¹⁹⁸

There is the question of eliminating the Governor's veto by proceeding by concurrent resolution. The West Virginia Constitution requires that bills be presented to the Governor before they become law for approval, subject to veto which in turn is subject to override by the Legislature.¹⁹⁹ The requirement is considered to be mandatory. As the Supreme Court of Appeals confirmed in a recent case, "the provision of the Constitution which requires presentation of a bill to the Governor before it shall become a law is mandatory and that in the absence of such presentation the enactment of the statute is a nullity."²⁰⁰ Once more, the constitutional issue created by the 1976 Amendments is obvious.

The probable response of the Supreme Court of Appeals to these constitutional questions seems difficult to predict. Perhaps to some extent this is attributable to the magnitude of the principles which necessarily collide. At its most fundamental level the issue is the proper balance to be maintained in the workings of government.

IV. DEPARTURES FROM RULE-MAKING PROCEDURES AND THEIR IMPACT ON THE VALIDITY OF RULES

The procedural requirements which pervade the development of administrative rules resemble a maze marked with innumerable pitfalls for the unwary. It is not difficult to generate sympathy toward those who bear the responsibility for procedural compliance in rule making and particularly toward the agencies and the

¹⁹⁷ W. VA. CONST. art. VI, §§ 24, 28, 29, 31.

¹⁹⁸ See generally Horack, *Constitutional Limitations on Legislative Procedure in West Virginia*, 39 W. VA. L.Q. 294 (1933).

¹⁹⁹ W. VA. CONST. art. VII, § 14.

²⁰⁰ *State ex rel. Browning v. Blankenship*, 154 W.Va. 253, 266, 175 S.E.2d 172, 180 (1970); cf. *In Re Adkins*, 83 W.Va. 673, 98 S.E. 888 (1919).

Secretary of State whose burdens, unlike those of the Legislature, are not self-imposed. Admittedly, these responsibilities are great and demand a commitment of resources and effort. Yet there are equally dramatic benefits to be realized in terms of public notice and participation, and it is to this side that the Legislature has tipped the balance under the 1964 Act and to an even greater extent under the 1976 Amendments.

The Legislature anticipated that all agencies could not be expected to shoulder their responsibilities for rule-making procedures with equal zeal. As an incentive to those less than enthralled with the virtues of public notice and participation, the Legislature adopted the principle that departures from prescribed procedure may render the rule ineffective and applied the principle in various ways at various points in the rule-making process.

In this section, the opportunities for departure from procedure and the probable consequences are considered. The discussion focuses on these issues at the level of the agencies and the Secretary of State. Ultimately, this analysis provides the framework for determining whether a particular agency rule is vulnerable on account of adoption without compliance with statutory rule-making procedures. The relevance of these procedures is greater than one might expect. The relative simplicity of the prescribed procedures is deceptive and is not an indicator of the probability of compliance. Reports are numerous of deficiencies in procedural compliance on the part of agencies and others in various jurisdictions.²⁰¹ There is no reason to believe that a different situation exists in West Virginia today.

A. *Procedural Irregularities and the Administrative Agencies*

A preceding section presented a detailed discussion of the rule-making responsibilities of the administrative agencies both before and after enactment of the 1976 Amendments.²⁰² This dis-

²⁰¹ Beasley, *Publication Under the New Tennessee Uniform Administrative Procedures Act and the Public's Right to Know*, 6 MEMPH. ST. L. REV. 187, 194 (1976); see Boone, *An Examination of the Tennessee Law of Administrative Procedure*, 1 VAND. L. REV. 339, 351-52 (1948); O'Leary, *supra* note 115, at 69-71; Note, 1 ARIZ. L. REV. 329, 330 (1959); Louisiana's "New" Administrative Procedure Act, *Highlights of the 1974 Regular Session Legislative Symposium*, 35 LA. L. REV. 629, 638 (1975); Comment, *The Quest for Justice in Maine Administrative Procedure: The Administrative Code in Application and Theory*, 18 U. ME. L. REV. 218, 231 (1966).

²⁰² See generally text accompanying notes 66-112 *supra*.

cussion serves more than an interest in historical perspective or thoroughness since the 1976 Amendments apply only to rules and regulations promulgated after their effective date, June 7, 1976.²⁰³ This interest also goes beyond transitional problems in converting from one set of procedural requirements to another since there are at this time many administrative rules which were promulgated prior to June 7, 1976, and which are still in effect. The validity of these rules must be tested against the procedures in effect prior to that date since the 1976 Amendments provide that "[e]very rule or regulation heretofore lawfully promulgated pursuant to the prior provisions of this article shall remain in full force and effect. . . ."²⁰⁴ Rules promulgated before July 1, 1964 (the effective date of the 1964 Act), have been relegated to the realm of historical curiosity for present purposes. Conceivably such rules still exist. If so, their validity must be assessed in light of the specific procedures applicable at the time, a time during which there was no comprehensive administrative procedure act in West Virginia. Actually, there was a requirement enacted in 1955 that agency rules be filed with the Secretary of State.²⁰⁵ Fortunately, the 1964 Act eliminated the need to inquire concerning the filing of a rule under the earlier provision because it required agencies to compile and index all rules in force and effect on July 1, 1964, and file them with the Secretary of State.²⁰⁶ In the event of failure to file the Act provided such rules "not so filed shall become void and unenforceable and shall be of no legal force and effect."²⁰⁷ This provides an initial point for analysis, if the unlikely occasion arises to examine the validity of a rule adopted before July 1, 1964.

Once it is established or conceded that agency action constitutes rule making subject to the requirements of the Act, the validity of the rule from a procedural standpoint turns in part on whether the agency strayed from the prescribed path in adopting it.

For rules promulgated under the 1964 Act prior to its amendment, the first subject for inquiry is the notice given by the agency of its proposed rule. The Act required that written notice be given in the form and with the content prescribed by statute to those

²⁰³ W. VA. CODE ANN. § 29A-3-3 (1976 Replacement Vol.).

²⁰⁴ W. VA. CODE ANN. § 29A-3-15 (1976 Replacement Vol.).

²⁰⁵ Acts of the 52d W. Va. Leg. ch. 159, Reg. Sess. [1955].

²⁰⁶ W. VA. CODE ANN. § 29A-2-1(a) (1976 Replacement Vol.).

²⁰⁷ *Id.*

requesting it.²⁰⁸ Determining compliance on this point may present some difficulty, especially with older rules. Agency records are the most likely source of this information and may prove difficult to locate, if they still exist.

A search to determine the adequacy of notice provided for proposed rule making is not without the prospect of substantial rewards for the person challenging the rule because the law provided that "no rule hereafter adopted is valid unless adopted in substantial compliance" with these notice requirements.²⁰⁹ Although technical errors in form or content will not provide the basis for defeat of the rule, substantial defects will. As a general proposition, "substantial compliance is achieved when the statutory purposes *are* accomplished, regardless of minor omissions."²¹⁰ It has been suggested that this approach to substantial compliance has full judicial support.²¹¹ The fact that the relevant evidence on this matter is likely to be in the agency's possession suggests that it would not be unreasonable to place the burden of demonstrating procedural compliance on the agency rather than on the person challenging the regulation.²¹²

The problems of proof are less difficult and the issue of burden of proof is of less practical significance for final rules than for proposed rules under the 1964 Act. The statute provided that final rules, following public notice and participation, "shall not become effective unless and until two certified copies of such rule have been on file in the office of the secretary of state for thirty consecu-

²⁰⁸ Acts of the 56th W. Va. Leg. ch. 1, § 29A-3-2, Reg. Sess. [1964] (amended and reenacted 1976).

²⁰⁹ *Id.*

²¹⁰ Merrill, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1, 18 (1964).

²¹¹ *Id.*

²¹² This approach would not appear to be unprecedented in West Virginia in at least a criminal law context where, of course, the burden is customarily on the prosecution. See *State v. Bunner*, 126 W. Va. 280, 289-90, 27 S.E.2d 823, 828 (1943). The court stated, "The indictment is further defective in that it does not allege that the regulations came into effect on or before the date of the alleged violation It was imperative that this indictment should show the regulations to have been brought effectively into force before their alleged violation. Courts do not take judicial notice of municipal ordinances. No more liberal rule is possible as to regulations of a mere administrative body or official." (footnotes omitted). See *People v. Calabro*, 7 Misc. 2d 732, 170 N.Y.S.2d 876 (1957) (requiring dismissal of an information charging violation of a rule for failure of proof of required filing with the Secretary of State).

tive days.”²¹³ This requirement applied not only to final rules for which public notice and participation was required prior to adoption, but also to agencies, such as the Public Service Commission, whose final rules need only be filed.²¹⁴

To establish that an agency has discharged its procedural responsibilities under the 1976 Amendments for rules promulgated after June 7, 1976, is in most instances a simple task because both notice of proposed rule making and final rules must be filed in the state register by the agency. The same is true for the notice of hearing and final findings and determinations on statutory conditions precedent to rule making. For rules which must be presented to the Legislative Rule-making Review Committee for approval, the agency also is required to include in its notice of a final rule a certificate showing the date of presentation of the proposed rule to the Committee.

Consideration should also be given to the question of whether the agency has lawfully promulgated procedural rules which are mandatory under the Act. It has been suggested that failure to adopt procedural rules should be considered “prima facie, as substantial error,” although it seems that Massachusetts’ courts have been “somewhat inclined to adopt a benign attitude towards the procedural misadventures of administrative agencies, especially the lack of adequate rules.”²¹⁵ This should not lead one to conclude that the point is without merit. The policy underlying this requirement is sound and needs only a firm judicial stand to make clear to agencies that the courts will compel what the legislature has required. In this situation the Supreme Court of Oklahoma met the challenge and concluded that the State Professional Practices Commission was not entitled to conduct hearings until such time as it adopted rules governing hearings on complaints, as required under the Oklahoma Administrative Procedures Act.²¹⁶

This leads to the basic and pervasive question of what are to be the consequences of, for example, failure to make the appropriate filing with the Secretary of State. The Legislature has spoken

²¹³ Acts of the 56th W. Va. Leg. ch. 1, § 29A-3-4, Reg. Sess. [1964] (amended and reenacted 1976).

²¹⁴ W. VA. CODE ANN. § 29A-1-2 (1976 Replacement Vol.).

²¹⁵ Crowther, *The Massachusetts and Federal Efforts to Establish Uniform Procedural Rules for Administrative Agencies*, 24 AD. L. REV. 213, 215-18 (1972).

²¹⁶ *Adams v. Professional Practices Comm’n*, 524 P.2d 932, 933-34 (Okla. 1974); cf. *In re Rules and Regulations*, 118 Ohio App. 407, 195 N.E.2d 112 (1963).

frequently and clearly on the matter in the past and continued in this vein in the 1976 Amendments, which state that

[a]ny rules or regulations promulgated after the effective date of this section [June 7, 1976] and any amendment promulgated hereafter to any rule or regulation heretofore promulgated under the delegation of the power of the legislature or otherwise shall only be effective if promulgated in accordance with the provisions of this article.²¹⁷

It is difficult to see how the Legislature could have been more specific on the sanction for non-compliance. If, for example, an agency fails to make the required filing, its rule is not effective. Generally, the statute requires this result without qualification, although the slightly relaxed standard of substantial compliance has been retained in the 1976 Amendments for notice of proposed rule making.²¹⁸

In most cases, the permanent register in the Office of the Secretary of State is the source for the information relating to procedural compliance, and inquiry need not be confined to determining that the rule was filed. As to final rules, examination of the document itself may be fruitful. Unlike the provision for proposed rules, this portion of the law makes no reference to the sufficiency of substantial compliance. Arguably, compliance must be absolute in order for a rule to become effective. One court has held a rule invalid for non-compliance for the reason that the rule filed did not bear the requisite certification.²¹⁹ (Note that the West Virginia statute requires filing of two certified copies.²²⁰) The result is a harsh one when a rule is declared invalid for lack of a required certification, and such a result is subject to the legitimate criticism that form has been allowed to prevail over substance. In the case in question, the Arizona Commission of Agriculture and Horticulture had promulgated a rule in order to control an apparently persistent creature known as the Pink Bollworm of Cotton. The rule required that planters plow under the remnants of the cotton crop left after harvest. The defendant, Wacker, was charged with a misdemeanor for failure to comply with the rule. The Supreme Court of Appeals of Arizona declared the rule invalid for lack of

²¹⁷ W. VA. CODE ANN. § 29A-3-3 (1976 Replacement Vol.).

²¹⁸ W. VA. CODE ANN. § 29A-3-8 (1976 Replacement Vol.).

²¹⁹ *State v. Wacker*, 86 Ariz. 247, 344 P.2d 1004 (1959).

²²⁰ W. VA. CODE ANN. § 29A-1-2 (1976 Replacement Vol.).

the required certification, even though the rule had been deposited and filed with the Secretary of State.²²¹

As an extreme case *State v. Wacker* is useful. Although the Supreme Court of Appeals of Arizona did not elaborate on the basis for its decision and thus appears to have insisted on strict compliance for its own sake, it does not follow necessarily that there is no conceivable justification for its decision. A critic of the court's decision, in concluding that it had carried the rule of strict construction beyond the reason for its existence, noted "[n]evertheless, the interpretation rendered will awaken state administrative agencies from their incautious slumber to a sharpened awareness of procedural requirements animated by this decision."²²² Yet *State v. Wacker* should alert one to the basic question of when does a procedural requirement transcend the level of incidental technicality to an extent which justifies that its violation results in invalidation of a rule. Unless this question is given due consideration, one might conclude that all procedural requirements are mere technicalities to be overlooked whenever they threaten to have any effect and thereby totally ignore the statutory language prescribing invalidity for non-compliance. This question is imperative in situations where the lapse concerns a matter of more than passing consequence, such as a failure to file a rule with the Secretary of State.

The result which should follow from failure to file seems clear in light of the language of the statute and has been recognized by the Supreme Court of Appeals of West Virginia. One issue in the case of *Sheppe v. Board of Dental Examiners*²²³ was the validity of rules on which the Board relied in part in refusing to provide an applicant a required examination. The rules had not been filed with the Secretary of State under the 1955 law which required filing, in the absence of which the rule would "become void and unenforceable and shall be of no legal force and effect."²²⁴ Since the rule had not been filed, the court concluded that "the rules and regulations relied upon in this case are null and void and have no application thereto whatsoever . . . The state through its agencies has a right to control and regulate professions but such regulations

²²¹ *State v. Wacker*, 86 Ariz. 247, 252, 344 P.2d 1004, 1008 (1959).

²²² 1 ARIZ. L. REV. 329, 331 (1959).

²²³ *Sheppe v. Board of Dental Examiners*, 147 W. Va. 473, 128 S.E.2d 620 (1962).

²²⁴ Acts of the 52d W. Va. Leg. ch. 159, Reg. Sess. [1955].

. . . must conform to the laws made and provided for in such cases"²²⁵ One might view this case as unduly literal in its approach to a technicality. There is no indication that the applicant was prejudiced as a consequence of the Board's failure to file, but the decision fulfills a more far-reaching objective. At that time the Legislature had concluded that public notice of agency rules was to be achieved by filing. Had the court reached any other conclusion the intent of the Legislature would have been frustrated and the public at large denied notice in the manner prescribed. In this light, the technicality goes beyond the trivial. As Professor Cooper has suggested, "[i]t cannot be expected that agencies will, if left to their own devices, fully comply with public information provisions that are merely directory."²²⁶ Therefore, effective sanctions for non-compliance are essential, and the West Virginia Legislature provided accordingly. Results of the nature of that in *Sheppe v. Board of Dental Examiners* are not at all extraordinary. Numerous jurisdictions have reached comparable results in similar cases.²²⁷ The fact is that "the state courts have been inclined to enforce strictly the requirements as to filing of rules, and to hold that a rule not filed is not enforceable"²²⁸

B. *Procedural Irregularities and the Secretary of State*

A conclusion that an agency has satisfied its procedural obligations under the Act does not dispense with the necessity of further inquiry since the agencies are but one aspect of the total rule-making process. The responsibilities of others and the extent to

²²⁵ *Sheppe v. Board of Dental Examiners*, 147 W. Va. 473, 483, 128 S.E.2d 620, 626 (1943).

²²⁶ COOPER, *supra* note 30, at 170.

²²⁷ See *Mogis v. Lyman-Richey Sand & Gravel Corp.*, 189 F.2d 130 (8th Cir. 1951); *Todd v. State*, 205 Ga. 363, 53 S.E.2d 906 (1949); *Otani v. Contractor's License Board*, 51 Hawaii 673, 466 P.2d 1009 (1970); *State ex rel. Sights v. Edwards*, 228 Ind. 13, 89 N.E.2d 443 (1950); *Shearer v. Dailey*, 312 Ky. 226, 226 S.W.2d 955 (1950); *Commissioner, Dep't. of Community Affairs v. Boston Redevelopment Authority*, 362 Mass. 602, 289 N.E.2d 867 (1972); *Kneeland Liquor, Inc. v. Alcoholic Beverages Control Comm'n*, 345 Mass. 228, 186 N.E.2d 593 (1962); *People v. Cull*, 10 N.Y.2d 123, 218 N.Y.S.2d 38, 176 N.E.2d 495 (1961); *State ex rel. Board of Education v. Holt*, 174 Ohio St. 55, 186 N.E.2d 862 (1962); *Jamison Plumbing & Heating Co. v. Rose*, 14 Ohio App. 2d 47, 236 N.E.2d 561 (1967); *Adams v. Professional Practices Comm'n*, 524 P.2d 932 (Okla. 1974); *State v. Freeman*, 370 P.2d 307 (Okla. 1962); *Wisconsin Telephone Co. v. Department of Indus., Labor and Human Relations*, 68 Wis. 2d 345, 228 N.W.2d 649 (1975); *Mondovi Coop. Equity Ass'n. v. State*, 258 Wis. 505, 46 N.W.2d 825 (1951).

²²⁸ COOPER, *supra* note 30, at 211.

which their responsibilities have been discharged in a particular case must be considered to determine whether lapses in their execution have any impact on a rule's validity.

The obligations of the Office of the Secretary of State under the 1964 Act and the 1976 Amendments are primarily in the nature of repository and publisher of information pertaining to the rule-making process. A breakdown in the performance of either of these functions can undermine to a substantial degree fundamental rights of public notice and participation concerning agency rule making. Arguably, the remedy on such occasions lies in a mandamus proceeding to compel the government official to perform his duty²²⁹ because the duties pertaining to rule making appear to be more mandatory than discretionary. Perhaps in some circumstances there might be a basis for maintaining a private action for damages against the government official for individual harm arising out of the official's deficient performance.²³⁰ This section, however, is devoted to the probable consequences with regard to the validity of rules and to the overall operation of the rule-making process, rather than to the direct remedies which may be available against government officials.

For notice of proposed rule making the 1964 Act relied on the agencies alone, and for notice of final rules, on the Office of the Secretary of State. There is no indication that fulfilling the essentially passive, repository requirement of a permanent register for final rules in the Office of the Secretary of State has presented problems. Although volume alone may cause difficulty in searching for particular rules, the fact remains that the rules filed are there.

²²⁹ There would appear to be no administrative remedy available directly against the Secretary of State which otherwise must be exhausted in order to bring a mandamus proceeding. Cf. *Capitol Business Equip., Inc. v. Gates*, 155 W. Va. 260, 263, 184 S.E.2d 125, 126 (1971). Even when an administrative remedy exists, a writ of mandamus will be awarded in cases of unconscionable or undue delay. See *Kanawha Valley Transp. Co. v. Public Serv. Comm'n*, 219 S.E.2d 332 (W. Va. 1975); *Village of Bridgeport, Ohio v. Public Serv. Comm'n*, 125 W. Va. 342, 24 S.E.2d 285 (1914); 1A M.J. *Administrative Law*, § 23 (1967). The nature of the Secretary of State's responsibilities in this instance also would seem to be ministerial in nature. The Supreme Court of Appeals has stated in another context that "where . . . no element of discretion is left as to the precise mode of its performance, such duty is ministerial, and a writ of mandamus is proper to compel its performance." *Mountaineer Disposal Serv., Inc. v. Dyer*, 197 S.E.2d 111, 115, (W. Va. 1973).

²³⁰ See generally 1A M.J. *Administrative Law* § 24 (1967).

The publication responsibilities have been and remain an apparent source of difficulty for the Office of the Secretary of State and a source of aggravation for the public. The publication requirements under the 1964 Act were not incidental to its primary purposes nor tucked away and intertwined in provisions on other matters. A separate section of the statute, § 29A-3-7, concerned solely the publication responsibilities of the Office of the Secretary of State.²³¹ No pamphlets of agency rules and no quarterly bulletins have ever been published and made available to the public, as clearly and unambiguously required by law.²³²

Launching a comprehensive publication program of the variety envisioned under the 1964 Act is a project of some magnitude. The Legislature was not unaware of this, and the Secretary of State was not given a fixed time in which to institute the program. He was instructed to publish "as soon as practicable" after January 1, 1965.²³³ Nor did the Legislature ignore the practical realities and the problems which its demands might produce. It gave the Secretary discretionary authority to omit from publication materials "the publication of which would be unduly cumbersome, expensive or otherwise inexpedient."²³⁴ This discretionary power was not unlimited; it was conditional. Under the Act, the Secretary could omit publication only "if such rules are made available in printed or processed form on application to the adopting agency, and if the publication in pamphlet form or the quarterly bulletins contain a statement stating the general subject matter of the rules so omitted and stating how copies thereof may be obtained."²³⁵ The Secretary was not given an option not to publish at all but only an opportunity to simplify the content of the publication.

Nor did the Legislature ignore expense of publication. It provided a means by which publication could be accomplished on a generally self-sustaining basis, thus realizing a significant reduction in cost to the state. The pamphlets and quarterly publications

²³¹ Acts of the 56th W. Va. Leg. ch. 1, § 29A-3-7, Reg. Sess. [1964] (amended and reenacted 1976).

²³² See Letter from Edgar F. Heiskell III, Secretary of State, to William E. Johnson, October 9, 1973; letter from John D. Rockefeller, IV, Secretary of State, to William E. Johnson, on file in West Virginia University College of Law Library.

²³³ Acts of the 56th W. Va. Leg. ch. 1, § 29A-3-7(a) Reg. Sess. [1964] (amended and reenacted 1976).

²³⁴ Acts of the 56th W. Va. Leg. ch. 1, § 29A-3-7(c), Reg. Sess. [1964] (amended and reenacted 1976).

²³⁵ *Id.*

were to be available without charge only to state officials. All others were to pay for them at a price fixed by the Secretary of State to cover the cost of publication and mailing, with receipts deposited in the state treasury to the credit of the state general fund.²³⁶

It has been suggested that failure on the part of the Legislature to appropriate funds for publication has been the reason for failure to publish. Other states have had similar experiences.²³⁷ Perhaps this is so and can be appreciated only by those initiated in subtle intricacies of the appropriations process. This might be more convincing if the burden of publication were greater; however, the Act presents explicitly the means for shifting much of the burden from the Secretary of State. The costs of publication and mailing paid from an appropriation would be reimbursed to the state by subscription fees charged to the public. If the Secretary of State set the price properly, reimbursement of these costs could have been virtually total. Thus, with this burden shifted to the public, the drain on public funds would have been merely temporary.

Admittedly, there would have been administrative costs which the Secretary of State would have had to bear, but even here there was an opportunity to shift much of the burden elsewhere. The 1964 Act authorized the Secretary to "prescribe by rule a standard size, format and numbering system for rules to be filed in his office, making exception where rules issued by other agencies cannot effectively convey necessary information within the size and format established."²³⁸ At the Secretary of State's disposal was the power to insist on the form for rules filed with him and the equally necessary right to refuse to accept those which did not follow the prescribed form. There is no reason why this power might not have been used to prescribe a form suitable for transmission directly to a printer, thereby assuring a substantial reduction in the administrative burdens of publication on the Office of the Secretary of State.

For these reasons the necessary appropriation need not have been of overwhelming proportions, and presumably the Legislature

²³⁶ *Id.*

²³⁷ See Hazard, *The Oregon Administrative Procedure Act: Status and Prospects*, 39 OR. L. REV. 97, 106 (1960); Comment, *The Quest for Justice in Maine Administrative Procedure: The Administrative Code in Application and Theory*, 18 U. ME. L. REV. 218, 231 (1976).

²³⁸ W. VA. CODE ANN. § 29A-2-1(b) (1976 Replacement Vol.).

would not have been expected to resist a request for a modest appropriation to achieve what it had required. Whether any sustained effort to obtain the wherewithal to publish was ever mounted is not known. It is true that legislatures sometimes frustrate administrative programs by denying support through the power of the purse. The executive branch may act similarly by refusing to request appropriations for programs it does not support, and the impoundment controversy in recent years demonstrates that on occasion the executive at the federal level has attempted control of agency action by refusing to spend funds which have been appropriated.²³⁹ Perhaps such forces have from time to time existed to deny the Office of the Secretary of State the funds for publication. If they indeed have, their intensity and durability has been remarkable. The 1964 Act has been in effect under the stewardship of five Secretaries of State, three Democratic and two Republican.²⁴⁰ A more likely and plausible explanation would seem to be that no one considered the matter of sufficient importance to muster a sustained effort to obtain the resources for publication.

For whatever reasons, good or bad, the complete legislative scheme for public notice of final agency rules was never implemented, thus presenting the issue of what effect, if any, the absence of required pamphlets and bulletins should have on current agency rules whose validity must be assessed on the basis of the 1964 Act. The assumption is that the agency has done all which is required of it in connection with promulgation of its rule.

The statutory language pertaining to the effectiveness of final rules in the 1964 Act suggests that a rule was to become effective upon expiration of a prescribed period of time after filing of the rule with the Secretary of State. Rules for which the agency was required to afford public notice and participation did not become effective "unless and until two certified copies of such rule [had] been on file in the office of the secretary of state for thirty consecutive days."²⁴¹ For agencies not subject to any requirements other

²³⁹ See generally Note, *Impoundment of Funds*, 86 HARV. L. REV. 1505 (1973).

²⁴⁰ The Honorable Joe F. Burdett (D), 1964-65; The Honorable Robert D. Bailey (D), 1965-68; The Honorable John D. Rockefeller IV (D), 1968-72; The Honorable Edgar F. Heiskell III (R), 1972-75; The Honorable James R. McCartney (R), 1975-77.

²⁴¹ Acts of the 56th W. Va. Leg. ch. 1, § 29A-3-4, Reg. Sess. [1964] (amended and reenacted 1976).

than filing of final rules, identical language was used, but a sixty day waiting period was provided.²⁴²

There is no indication on the face of the statute that publication by the Secretary of State was a condition precedent to the effectiveness of agency rules filed with the Secretary. Nevertheless, further inquiry beyond the express terms of the statute is warranted. It does not seem unreasonable to ask at least whether failure to publish the requisite pamphlets and bulletins frustrated the purpose of the system of public notice of final agency rules to a degree which justifies a conclusion that rules adopted under the 1964 Act are invalid. For a variety of reasons, the question must be answered in the negative. There is no ambiguity in the language of the statute relating to effectiveness upon filing. The command to publish is qualified by the "as soon as practicable"²⁴³ concept, thus suggesting that the adverse consequences of failure to publish need not reasonably result in invalidation of rules. Significantly, publication prior to 1976 involved only final rules, notice of which was available in the Office of the Secretary of State, although on a less convenient basis than might have been afforded by publication. The relative infrequency of publication on a quarterly basis suggests that it was unlikely that legal consequences were expected to result from a failure to publish. Consequently, there is considerable basis for concluding that the unfortunate situation which existed was not tantamount to illegality.

The 1976 Amendments present significantly greater and probably insurmountable obstacles to promulgation of valid agency rules so long as the Secretary of State has not fulfilled his responsibilities to publish and make available copies of the state register and weekly supplements, no matter how valid his justification. This is because of aspects of the Amendments which place greater reliance on the state register in the operation of the rule-making process, make greater demands of the Secretary of State, and provide unambiguous sanctions for non-compliance.

There is no uncertainty concerning when the state register was to have been completed for duplication and distribution. The Legislature instructed that this be done within ninety days of June 7, 1976.²⁴⁴ Absolutely nothing was mentioned of "as soon as practica-

²⁴² W. VA. CODE ANN. § 29A-1-2 (1976 Replacement Vol.).

²⁴³ Acts of the 56th W. Va. Leg. ch. 1, § 29A-3-7, Reg. Sess. [1964] (amended and reenacted 1976).

²⁴⁴ W. VA. CODE ANN. § 29A-3-4 (1976 Replacement Vol.).

ble." The requirement is quite reasonable, considering that the state register is intended to provide public notice of various steps in the rule-making process leading to final adoption. This includes notice of proposed rule making and the time and manner in which public rights of participation on a proposal may be exercised. The obligation of personal notice of proposed rules, which previously had been assigned to the agencies, was eliminated by the Amendments. Today the only legally prescribed notice must be found in the state register. The legislative scheme cannot function at all without publication of the register. To suggest that the agencies themselves might still afford notice as a matter of sound practice only ignores the fact that the minimum notice required by the statute has not been provided. Additional responsibilities, voluntarily accepted, should not be taken as satisfactory substitutes.

The 1976 Amendments were intended to improve the quality and availability of public notice and participation in rule making. This is their potential. In assigning greater responsibilities to the Secretary of State, however, there was a commensurate increase in the consequences of inadequate or incomplete response to meet them. The Legislature might have been satisfied to require those with responsibilities under the amendments to do as best they could, but it was not. The Legislature provided that "any rules or regulations promulgated after the effective date of this section [June 7, 1976] and any amendment promulgated hereafter to any rule or regulation heretofore promulgated under the delegation of the power of the legislature or otherwise shall only be *effective* if promulgated in accordance with the provisions of this *article*."²⁴⁵ (emphasis added). Included in "this article" are the publication obligations of the Secretary of State.

In this light, can any agency rule promulgated after June 7, 1976, and subject to the 1976 Amendments become effective prior to a time when the state register and weekly supplements are published and available for distribution, and the relevant notices in fact have appeared in those publications? Are rules which purport to be lawfully adopted final rules which even may have received the approval of the Legislative Rule-making Review Committee actually entitled to respect, even though promulgated in the interim without benefit of a published register?

Naturally, there are practical considerations which to some

²⁴⁵ W. VA. CODE ANN. § 29A-3-3 (1976 Replacement Vol.).

persons compel answers to the questions upholding the validity of rules adopted during this period. To find otherwise means that the rule-making process ceased to function on June 7, 1976, or at least ninety days thereafter, pending preparation, publication, and availability of the state register. Pragmatism is infectious in situations of this nature, leading one commentator to suggest with regard to a similar situation in Oregon that considerable latitude should be granted and that failure to publish should be treated as merely formal error. But even there the the issue was not failure to publish but only the frequency of publication by the Oregon Secretary of State within the constraints of a meager appropriation.²⁴⁶ The question remains whether a more practical conclusion which allows the process to continue unencumbered by the niceties of procedural compliance is permissible under the 1976 Amendments.

Perhaps the Legislature could have been more precise in providing for the effectiveness of rules only upon publication, as some state legislatures have been.²⁴⁷ Yet there is little imprecision in the statement that rules "shall only be effective if promulgated in accordance with the provisions of this article."²⁴⁸

There is language elsewhere in the article which does deserve scrutiny in considering the impact of failure to publish. The statute describes various obligations of the agencies and in some instances the Legislature concerning their duty to file in the state register. This duty is sometimes expressed in conjunction with language concerning a rule's effectiveness or effective date. For example, the Act provides that

[1] Before any rules or regulations mentioned in section five (§ 29A-3-5) shall be effective, the agency shall . . . file such findings and determinations in the state register.²⁴⁹

²⁴⁶ Hazard, *The Oregon Administrative Procedure Act: Status and Prospects*, 39 OR. L. REV. 97, 106 (1960).

²⁴⁷ *E.g.*, COLO. REV. STAT. § 24-4-103(5) (1973), which provides: "A rule shall become effective twenty days after publication of the rule as finally adopted"; IOWA CODE ANN. § 17A.5,2.0 (Supp. 1977), which provides: "Each rule hereafter adopted is effective thirty-five days after filing, as required in this section, and indexing and publication as required"; LA. REV. STAT. § 49.954.B. (Supp. 1977), which provides: "Each rule hereafter adopted shall be effective upon its publication in the Louisiana Register"

²⁴⁸ W. VA. CODE ANN. § 29A-3-3 (1976 Replacement Vol.).

²⁴⁹ W. VA. CODE ANN. § 29A-3-6 (1976 Replacement Vol.).

[2] The agency shall file in the state register a notice of its action . . . and a proposed effective date. . . . [S]uch proposed effective date shall not be less than thirty days after the date of filing of such notice.²⁵⁰

[3] [T]he committee shall . . . file notice of its action in the state register To the extent that a proposed rule or regulation is approved by the committee it shall be effective thirty days after the filing of notice of approval or on the effective date proposed by the agency, whichever is later²⁵¹

[4] [T]he clerk of the house originating such resolution shall forthwith file a copy thereof in the state register . . . and any rule or regulation or part thereof made effective by such resolution shall only be effective thirty days after such concurrent resolution is filed in the state register or upon the effective date proposed by the agency, whichever is later²⁵²

These excerpts suggest that the key to effectiveness of a rule is the filing thereof in the state register, subject to expiration of a period of time which in no case will be less than thirty days. Filing in the register is the key so far as agencies are concerned. If the agency fails to file, its rule will never become effective. However, the fact that a rule is deemed effective for one purpose does not require that it be effective for all purposes. Nor is it dispositive that effectiveness is not tied explicitly to publication, but is tied to filing. The date of filing is a convenient bench-mark for measuring the time at which a rule becomes effective. It is known and accessible to the agency, whereas the date of publication might be less so.

Measuring effectiveness on the basis of filing date in no way undermines the utility and significance of published notice. Since a rule cannot become effective sooner than thirty days after filing, there is ample opportunity for adequate and timely notice, if the register is published with weekly supplements. This is equally true for proposals which must provide for public participation no sooner than thirty days after filing. Persons noting a proposal in a weekly supplement would have adequate time, although something less than thirty days, to prepare for and participate in the rule-making process, if they desire. A standard based on the date of filing is entirely compatible with the published notice which still allows sufficient time for public response.

²⁵⁰ W. VA. CODE ANN. § 29A-3-10 (1976 Replacement Vol.).

²⁵¹ W. VA. CODE ANN. § 29A-3-11(b) (1976 Replacement Vol.).

²⁵² W. VA. CODE ANN. § 29A-3-12 (1976 Replacement Vol.).

The 1964 publication requirements were decidedly different from the present ones, in that they applied only to final rules which might go into effect prior to publication in a quarterly bulletin. The 1976 publication requirements present opportunities for actual public notice and participation. The publications envisioned under the 1976 Amendments are capable of doing much more than providing a convenient source of information published after the fact.

To conclude that the validity of agency rules promulgated under the 1976 Amendments turns on compliance with the publication requirements imposed on the Secretary of State no doubt will seem to some unduly drastic and extraordinary, especially when the agencies have done all that is required of them. In this light, one might accept a declaration of invalidity for failure to file with the Secretary of State, but challenge the wisdom of a decision of this nature when the agency is in no way at fault. The answer to the dilemma lies in directing attention to the real issue, which is not who has failed to meet his responsibilities under the 1976 Amendments, but rather which responsibilities have not been discharged. The full burden of providing public notice and participation in rule making is carried by no single institution of government. The 1976 Amendments provide a division of labor and responsibility among the agencies, the Secretary of State, and, to a degree, the Legislature itself. Thus, the fact that one institution satisfies its obligations should not have a mitigating effect in the face of shortcomings elsewhere in the total system for notice and public participation.

Once it is recognized that the proper focus of attention is the nature of that which has not been done, it becomes apparent that a decision of invalidity is a natural and proper result for which the blameless agency unfortunately must bear the principal burden. As we have seen, what to date has not been done under the 1976 Amendments involves providing the notice of proposed and final rules in a state register as prescribed by the 1976 Amendments. In situations where, for example, it has been the responsibility of an agency to provide notice of proposed rule making, various courts have not hesitated to declare agency action invalid when notice was not afforded.²⁵³ The only difference in West Virginia today is

²⁵³ *E.g.*, *Rodway v. Department of Agriculture*, 514 F.2d 809 (1975); *Wagner Electric Corp. v. Volpe*, 466 F.2d 1013 (1972); *Massachusetts General Hospital v. Comm'r of Public Welfare*, 347 Mass. 24, 196 N.E.2d 181 (1964); *Kneeland Liquor*,

that it is the Secretary of State, and not the agencies, who has the responsibility to disseminate public notice.²⁵⁴ Similarly, when publication has been required in order for a notice of proposed rule or final rule to be effective, courts have not hesitated to find such actions invalid.²⁵⁵

Ultimately, resolution of the issue in West Virginia must turn on legislative intent, although the author, for one, finds the language of the 1976 Amendments sufficiently clear and unambiguous to invoke the principle that "[p]lain language should be afforded its plain meaning. Rules of interpretation are resorted to for the purpose of resolving an ambiguity, not for the purpose of creating it."²⁵⁶ Those less comfortable with the consequences of invalidity must somehow justify the conclusion that the Legislature could not possibly have meant what it said.

Nevertheless, if the Legislature had intended rules to become effective upon filing for all purposes, it might have said so in much simpler terms.²⁵⁷ If publication were intended to provide informa-

Inc. v. Alcoholic Beverage Control Comm'n, 345 Mass. 228, 186 N.E.2d 593 (1962); *Glaser v. Downes*, 126 N.J. Super. 10, 312 A.2d 654 (1973); *State v. Squally*, 78 Wash. 2d 475, 474 P.2d 897 (Wash. 1970).

²⁵⁴ This analysis is relevant in cases of departures from prescribed procedure which involve fundamental rights and responsibilities. There must be adequate allowance for minor procedural lapses and one would expect the Supreme Court of Appeals to accommodate them. *Cf. West v. West Virginia Fair Association*, 97 W. Va. 10, 17, 125 S.E. 353, 356 (1924). In this case, the Court rejected the argument that a clerical error rendered a public notice invalid when the notice substantially served its purpose.

²⁵⁵ *Percy v. Brennan*, 384 F. Supp. 800, 813 (S.D.N.Y. 1974); *City of New York v. Diamond* 379 F. Supp. 503, 518 (S.D.N.Y. 1974); *Thomas v. County Office Committee*, 327 F. Supp. 1244, 1253 (S.D. Tex. 1971); *Graham v. Lawrimore*, 185 F. Supp. 761, 763-64 (E.D.S.C. 1960); *United States v. Morelock*, 124 F. Supp. 932, 944 (D.C. Md. 1954); *Junghans v. Dept. of Human Resources*, 289 A.2d 17, 23 (D.C. 1972); *Williams v. State*, 95 Iowa 5, 8-9, 501 P.2d 203, 206-07 (1972); *State ex rel. Villines v. Freeman*, 370 P.2d 307, 312 (Okla. 1962) (Statute mandating filing and publication of rules and regulations held constitutional.); *Whitman v. Department of Taxation*, 240 Wis. 564, 577-78, 4 N.W.2d 180, 186 (1942) (presumption of publication applied); see Cohen, *Publication of State Administrative Regulations—Reform in Slow Motion*, 14 BUFF. L. REV. 410, 419-20 (1964-65).

²⁵⁶ *Crockett v. Andrews*, 153 W. Va. 714, 719, 172 S.E.2d 384, 387 (1970).

²⁵⁷ The fact that it did not supports the proposition that rules are to be effective on publication, for the Supreme Court of Appeals has indicated as a general proposition that "[w]e cannot assume in the absence of wording clearly indicating contrariwise that the Legislature would use words that are unnecessary, and use them in such a way as to obscure, rather than clarify, the purposes which it had in mind" *State ex rel. Ballard v. Vest*, 136 W. Va. 80, 87, 65 S.E.2d 649, 653 (1951).

tion gratuitously and for no other purpose, the Legislature might have made it a less integral part of the process. Even a cursory examination of the 1976 Amendments suggests an overall intention to make agency rule making a more open process, available and accountable to the public either directly or indirectly through their elected representatives in the Legislature. For this reason, it would be remarkable if the 1976 Amendments were to have the effect of providing notice of proposed rule making only at such time as the Secretary of State finds it feasible to publish the state register, in view of the fact that the 1964 Act at least placed an affirmative duty on the agencies to provide notice to those requesting it. This is the result if the publication requirements under the 1976 Amendments are interpreted as providing optional frills whose existence or non-existence has no bearing on the validity of rules. In this light, the intent of the Legislature seems unambiguous in its requirement that rules "shall only be effective if promulgated in accordance with the provisions of this article," and there is reason to believe the Supreme Court of Appeals would be receptive to this view. In *Crockett v. Andrews*,²⁵⁸ the Court refused to permit agency rule making by interpretation, noting that to do so would defeat "the legislative requirement that rules may be adopted only by compliance with required formalities such as printing and public distribution."²⁵⁹

To conclude that no valid regulation may be promulgated until such time as there is a published state register indeed has the effect of bringing agency rule-making activity to a standstill.²⁶⁰ This is drastic and unfortunate, especially if failure to publish is attributable to a lack of resources and not a deficiency in interest. But it does not follow that the Legislature could not possibly have intended that result. That may be precisely what was intended.²⁶¹ The suggestion has been made that to tie the validity of rules to

²⁵⁸ 153 W. Va. 714, 172 S.E.2d 384 (1970).

²⁵⁹ *Id.* at 720, 172 S.E.2d at 387.

²⁶⁰ One advantage of a system which relies on filing rather than publication as a prerequisite to effectiveness of a rule is that this possibility is eliminated. A change in Oklahoma law some years ago from a publication to a filing standard was considered desirable by one commentator, "since there are many circumstances that might deter publication or give rise to questions concerning its adequacy." Merrill, *Oklahoma's New Administrative Procedure Act*, 17 OKLA. L. REV. 1, 17-18 (1964).

²⁶¹ *Cf.* Comment, *The Quest for Justice in Maine Administrative Procedure: The Administrative Code in Application and Theory*, 18 U. ME. L. REV. 218, 236 (1966).

publication rather than filing, "recognizes effective notice to the public as an integral part of the regulation-making process," and "[i]ts impact on the appropriation process would be clear—no money, no regulations."²⁸² It does not seem unreasonable to suggest that the Legislature meant exactly what it said. To conclude otherwise requires torture of the language of the statute to a point almost beyond recognition.²⁸³

C. *Possible Justifications for a Finding of Validity of a Rule, Notwithstanding Procedural Irregularities.*

A hard and fast rule that agency rules be found invalid if there have been procedural irregularities may appear to be unreasonable and unnecessary formalism in some situations. If an agency promulgates a rule and fails to file it as required by law, for example, there may be reason to question a decision which precludes enforcement of the rule against one who had full and timely knowledge of the rule itself. In circumstances of this nature, courts sometimes have attempted to alleviate the harsher consequences of procedural irregularity. The purpose of this section is to consider various justifications which might be suggested to uphold rules which otherwise are procedurally defective.

Perhaps the most important consideration is the extent to which a person had prior knowledge of the agency's rule-making activities, even though notice was not provided in the manner required. A prominent illustration of this principle may be found in the Federal Administrative Procedure Act which requires (with respect to matters required to be published in the Federal Register) that "[e]xcept to the extent that a person has actual and timely notice of the terms thereof, a person may not in any manner be required to resort to, or be adversely affected by, a matter required to be published in the Federal Register and not so published."²⁸⁴ (Emphasis added). Any document required to be published in the Federal Register under the Federal Register Act "is not valid as against a person who has not had actual knowledge of it . . ."²⁸⁵

²⁸² O'Leary, *supra* note 115, at 73.

²⁸³ It does not appear that the power to adopt temporary rules in emergency situations pursuant to W. VA. CODE ANN. § 29A-3-14 (1976 Replacement Vol.) would provide relief in a moratorium on rule making, pending availability of the state register. A notice of emergency rule making itself must be filed in the state register and is limited to ninety days unless normal rule-making procedures are met.

²⁸⁴ 5 U.S.C. § 552(a)(1)(e) (1967) (emphasis added).

²⁸⁵ 44 U.S.C. § 1507 (1969).

One court refused to give effect to a regulation not published, even in the face of actual knowledge.²⁶⁶ This approach was rejected by the Second Circuit,²⁶⁷ and the quoted language from the Administrative Procedure Act which was added in 1967 appears to have put the question to rest. One commentator has suggested, "[a]ctual notice is still the best notice; the defense of nonpublication should be denied in cases of actual notice because there was no prejudice caused by failure to publish."²⁶⁸

These principles, although of substantial merit, are not automatically suitable for application in West Virginia, since its administrative law statutes do not contain comparable language establishing the effect of prior knowledge on the validity of rules. What little can be gleaned from case law is not particularly illuminating. In *Sheppe v. Board of Dental Examiners*,²⁶⁹ the Board relied on certain rules to support its case. The rules had not been filed with the Secretary of State as required. Although the parties had knowledge of the rules, the court concluded that the rules were null, void and of no application whatsoever. There is language in the case of *Rinehart v. Woodford Flying Service, Inc.*²⁷⁰ which suggests the possibility that knowledge might make a difference. There the plaintiff had landed his aircraft in accordance with properly promulgated landing rules, unaware that the local airport manager had adopted a local traffic rule at variance with the usual rule. In affirming a judgment awarding damages to the plaintiff for damages to his plane in an incident with another which was being operated in accordance with the local rule, the court emphasized that the plaintiff had no notice of the local rule or any instructions to the contrary, and thus the local rule "cannot be justified as against strangers."²⁷¹ Presumably the result would have been different had the plaintiff had knowledge of the local traffic rule.

These two decisions suggest that there may be some situations where knowledge should have the effect of sustaining application

²⁶⁶ *Hotch v. United States*, 212 F.2d 280 (9th Cir. 1954).

²⁶⁷ *United States v. Aarons*, 310 F.2d 341 (2d Cir. 1962); e.g., *Kessler v. FCC*, 326 F.2d 673, 689-90 (1963); *United States v. Monroe*, 408 F. Supp. 270, 275-77 (1976).

²⁶⁸ SCHWARTZ, *supra* note 12, at 181.

²⁶⁹ 147 W. Va. 473, 128 S.E.2d 620 (1962).

²⁷⁰ 122 W. Va. 392, 9 S.E.2d 521 (1940).

²⁷¹ *Id.* at 396, 9 S.E.2d at 523.

of a rule without regard to procedural irregularity and other situations where no significance will be attached to prior knowledge. It would be intolerable, for example, to find that one such as the plaintiff in *Rinehart v. Woodford Flying Service, Inc.* is entitled to follow the properly promulgated rule when he had knowledge that others are acting in accordance with a rule informally adopted. Where reliance on the lawful rule would create obvious danger to persons or property, prior knowledge should prevail over procedural regularity. The interest in encouraging procedural compliance is, in that situation, outweighed by interests of public safety. Applying this analysis to the *Sheppe* case, one can understand why a different result was justified there.

With this approach, one could expect frequent decisions of the kind rendered by the Supreme Court of Hawaii a few years ago. There, the Hawaii Housing Authority had failed to comply with rule-making procedures in adopting a regulation establishing maximum income limits for continued occupancy in certain public housing. In declaring the regulations invalid, the Court noted that

Not only were the rules in this case neither approved by the governor nor filed with the lieutenant governor, but they suffered the more fundamental defect of having been adopted in the absence of compliance with HRS § 91-3(a)(1) (Supp. 1973). That section constitutes an 'explicit . . . invitation to the public to participate in the formulation of . . . rule[s],' 1 Cooper 189. By refusing to extend that invitation as it was thus required to do, the HHA subverted the integrity of the rules themselves; it is obvious that this defect, which goes to the very substance of the rules, could not be cured merely by the plaintiffs' 'actual knowledge,' if any, that those rules existed.²⁷²

Noteworthy is the court's emphasis on deprivation of the right of public participation in the rule-making process as particularly relevant to a refusal to recognize knowledge as a cure to the procedural defect. As another court has noted, one cannot "presuppose that had the Directive been published before its actual date, there would have been no adverse comment or information furnished which would have caused the Secretary to recall it . . ."²⁷³ This consideration is especially relevant to the West Virginia experience under the 1976 Amendments.

²⁷² *Aguiar v. Hawaii Housing Authority*, 55 Hawaii 478, 491, 522 P.2d 1255, 1264 (1974).

²⁷³ *Lewis-Mota v. Secretary of Labor*, 469 F.2d 478, 482 (2d Cir. 1972).

Due regard must be given to the point that although recognition of knowledge as a bar to a determination of invalidity of a rule does balance the equities between the parties disputing the issue, this normally involves a corresponding sacrifice of the equities in favor of the public at large, especially where notice of proposed rule making is lacking. Also sacrificed is the efficacy of the incentive which invalidation provides for compliance by the agencies. In the absence of express statutory language in the West Virginia statute on the knowledge issue, it is recommended that the courts can serve these latter interests best by refusing to infer a knowledge limitation except where essential to the protection of public safety or health.

Another possible justification for validity notwithstanding procedural non-compliance is the doctrine of harmless error. Federal law contains a statutory provision on the point of prejudicial error. In a provision on the scope of judicial review over administrative action, the Federal Administrative Procedure Act provides that

[t]he reviewing court shall . . . hold unlawful and set aside agency action . . . found to be . . . without observance of procedure required by law; . . . In making the foregoing determinations, the court shall review the whole record . . . and due account shall be taken of the rule of prejudicial error.²⁷⁴

There remains considerable uncertainty with respect to just what the rule of prejudicial error is,²⁷⁵ but it has been suggested that in its application due regard should be given not only to protection of the litigant in the particular case, but also to "protection for litigants in general by securing agency adherence to those procedures which Congress has determined to be fundamental to fairness."²⁷⁶ It appears that the courts have tended to focus on harm in the particular case rather than injury to the system in general.²⁷⁷ One could carry the prejudicial error concept to the point of repeal-

²⁷⁴ 5 U.S.C. § 706 (1970).

²⁷⁵ See Note, *Noncompliance with the APA as Reversible Error: The Function of "Prejudicial Error" and "Seasonable Objection"* 6 STAN. L. REV. 693 (1954).

²⁷⁶ *Id.* at 700-01.

²⁷⁷ *E.g.*, *NLRB v. Seine and Line Fisherman's Union*, 374 F.2d 974, 981 (9th Cir. 1967); *Kerner v. Celebrezze*, 340 F.2d 736, 740 (2d Cir. 1965), *cert. denied*, 382 U.S. 861 (1965); *Center for Auto Safety v. Tiemann*, 414 F. Supp. 215, 226 (D.D.C. 1976).

ing requirements of published notice of proposed rule making. This possibility has been noted and precluded.²⁷⁸

A rule of prejudicial error has emerged in the decisions of some state courts, even in the absence of an express statutory provision²⁷⁹ and where there was statutory guidance outside the administrative procedure act.²⁸⁰ The principle is not without boundary. The Superior Court of New Jersey indicated that

In our opinion the present case is not one in which the order should be nullified in order to secure in the future due observance of the administrative provisions of the statute before us; nor does it involve a fundamental policy that needs vindication. We are satisfied, after reviewing the record and the actions of the wage board, that substantial justice was rendered here.²⁸¹

The recognition, however, that the interests which must be considered extend beyond those of the parties in a dispute involving procedural irregularity helps insure that the doctrine of prejudicial error does not cause more harm than good.

No counterpart to the doctrine of prejudicial error exists in West Virginia's administrative law statutes. If the doctrine is to apply, the courts are left to their own resourcefulness, although the Supreme Court of Appeals has alluded to the possibility in a recent decision:

It is obvious that the lack of rules and regulations concerning the administering of an examination might well prejudice an applicant who may or may not be placed in peril by having to respond "in the blind" to examination procedures. The civil service commission on the other hand contends that the examination was obtained from the state civil service commission and is the same as administered throughout the State by county civil service commissions and that they in good faith attempted to comply with the provisions of the Act. Whether or not this is

²⁷⁸ See *Elof Hansson, Inc. v. United States*, 178 F. Supp. 922, 930 (Cust. Ct. 1959).

²⁷⁹ See *Kreshtool v. Delmarva Power and Light Co.*, 310 A.2d 649, 654-55 (Del. 1973); *Standard "Tote" Inc. v. Ohio State Racing Comm'n*, 58 Ohio Op. 337, 340, 121 N.E.2d 463, 467 (C.P. Franklin Co. 1954).

²⁸⁰ *J. Abbott & Son, Inc. v. Holderman*, 46 N.J. Super. 46, 56-57, 133 A.2d 705, 710-11 (1957); *Nordco, Inc. v. State*, 43 N.J. Super. 277, 286-87, 128 A.2d 491, 496-97 (1957); *Ass'n of New Jersey State College Faculties, Inc. v. Dungan*, 64 N.J. 338, 349, 316 A.2d 425, 431-32 (1974).

²⁸¹ *J. Abbott & Son, Inc. v. Holderman*, 46 N.J. Super. 46, 57, 133 A.2d 705, 710-11 (1957).

so, and whether or not the relators have been prejudiced by the procedures, should be fully developed at an evidentiary hearing.²⁸²

The Legislature has also addressed the issue in other contexts. West Virginia does have a statute dealing with harmless error in the judicial process,²⁸³ and the Supreme Court of Appeals has stated that "[t]he doctrine of harmless error is firmly established by statute, court rule and court decisions as a salutary aspect of the law of this state."²⁸⁴ It would not be unexpected to see application of the principle extended. In that event the boundaries discussed previously should apply, and the public's need for procedural compliance should be given appropriate weight.

Knowledge and the absence of prejudicial error are the principal justifications which may excuse procedural impropriety; however, there is one other which merits brief mention. It has been suggested that "substantial administrative reliance" on an invalid rule might justify finding actions taken thereunder valid.²⁸⁵ The difficulty in this approach is that widespread application of the principle would have the effect of sustaining the validity of invalid rules. The problem becomes greater as the amount of time on which the agency relied on its rule increases. A more satisfactory resolution of the problem is that suggested in the Revised Model State Act, which provides a two-year statute of limitations on actions which challenge rules on grounds of procedural noncompliance.²⁸⁶ There is no limitation of this nature in West Virginia.

Any inclination to temper the consequences of procedural noncompliance without statutory language on point naturally springs from a desire to avoid the "unrealistic" and "unjust" result in the individual case. Two final points should not be overlooked by those so inclined. First, so far as individual members of the public are concerned, "unrealistic" and "unjust" results frequently occur as a consequence of administrative procedure involving public notice of agency rules. The case of *Federal Crop Insurance Corp. v.*

²⁸² Hall v. Protan, 195 S.E.2d 380, 382-83 (W. Va. 1973).

²⁸³ W. VA. CODE ANN. § 58-1-2 (Cum. Supp. 1977). See also W. VA. R. CIV. P. 61.

²⁸⁴ State Road Comm'n v. Bowling, 152 W. Va. 688, 697, 166 S.E.2d 119, 125 (1969).

²⁸⁵ Mercer Council #4, New Jersey Civil Service Ass'n, Inc. v. Alloway, 61 N.J. 516, 296 A.2d 305 (1972).

²⁸⁶ COOPER, *supra* note 30, at 207-08; Bonfield, *supra* note 20 at 874.

*Merrill*²⁸⁷ is illustrative. There a wheat grower applied for and received crop insurance. The crop was destroyed by drought, but recovery under the insurance agreement was denied because barred by rules properly adopted and published in the Federal Register. The grower had no knowledge of the rule. With respect to the grower's predicament, Mr. Justice Frankfurter stated that

[A]ccordingly, the Wheat Crop Insurance Regulations were binding on all who sought to come within the Federal Crop Insurance Act, regardless of actual knowledge of what is in the Regulations or of the hardship resulting from innocent ignorance. The oft-quoted observation in *Rock Island, Arkansas & Louisiana Railroad Co. v. United States*, 254 U.S. 141, 143 that "Men must turn square corners when they deal with the Government," does not reflect a callous outlook.²⁸⁸

There were equities which might have lead one in another direction. As Mr. Justice Jackson indicated in dissent:

To my mind, it is an absurdity to hold that every farmer who insures his crops knows what the Federal Register contains or even knows that there is such a publication. If he were to peruse this voluminous and dull publication as it is issued from time to time in order to make sure whether anything has been promulgated that affects his rights, he would never need crop insurance, for he would never get time to plant any crops. Nor am I convinced that a reading of technically-worded regulations would enlighten him much in any event.²⁸⁹

Nonetheless, the principle is well-established that the public will be deemed to have constructive notice of duly promulgated administrative rules. Second, it is essential in considering justifications for noncompliance that constructive notice is the carrot and invalidity the stick with which the Legislature intended to bring about procedural compliance.²⁹⁰ The effect of recognizing such justifications is to relieve the agency of much of the burden and none of the benefits.

²⁸⁷ 332 U.S. 380 (1947).

²⁸⁸ *Id.* at 385.

²⁸⁹ *Id.* at 387.

²⁹⁰ See generally Note, *The Federal Register and the Code of Federal Regulations—A Reappraisal*, 80 HARV. L. REV. 439, 442-45 (1966).

V. ADMINISTRATIVE RULE MAKING IN WEST VIRGINIA—SOME OBSERVATIONS FOR THE FUTURE

The policies reflected in the 1976 Amendments are fundamentally sound and introduce legitimate and desirable new concepts to the rule-making process in West Virginia. Publication of notice through the vehicle of a state register could improve the level of public participation in the rule-making process and the extent of actual knowledge of final agency rules. The legislative review process raises promising possibilities of improvement in the accountability of administrative agencies for inadequacies in their rule-making activities. Many of the problems on which this article has focused need be no more than temporary transitional problems, the resolution of which demands nothing more than a suitable commitment to the principles of the 1976 Amendments.

There is every indication that both the Office of the Secretary of State and the Legislative Rule-making Review Committee intend to devote the energy and resources to proper implementation of the 1976 Amendments.²⁹¹ There is some basis for hope that the state register in published form will be available along with its weekly supplements by the time this article is published. The current Secretary of State has expressed his intention to begin publication of new filings at the earliest possible date and thereafter publish those items previously filed.²⁹² These efforts are needed and welcomed.

Once publication begins, the problems which have been raised will not disappear. The question of the validity of rules promulgated under the 1976 Amendments without benefit of publication will remain, unless an agency elects to propose and adopt its rule in accordance with prescribed procedures, including publication. In addition, any rule may still be subject to questions concerning procedural compliance; such questions, however, will arise in

²⁹¹ On March 2, 1977, the author testified before the Legislative Rule-making Review Committee concerning some of the issues discussed in this article and was impressed with the care and attention which the Committee is giving to the matters before it. At that meeting the Committee decided to add to its staff support.

²⁹² Many of the issues discussed in this article first came to public attention on February 7, 1977, at a Conference on Administrative Rule Making in West Virginia sponsored by the West Virginia University College of Law and the West Virginia Bar Association. On March 4, 1977, the present Secretary of State, A. James Manchinn, announced at a press conference his intention to seek \$25,000 from the Legislature to publish a weekly register. *The Morgantown Morning Rep.*, March 5, 1977, at 8A, col. 4.

terms of individual rules, whereas the question of the effect of the absence of publication has application to all rules subject to basic rule-making procedures.²⁹³

There is less basis for predicting the intensity of commitment by the agencies to procedural compliance. Voluntary compliance is preferable, and one might expect this to be the rule and not the exception. Yet it is not unrealistic to assume that some agencies will not take this road. In these cases it is imperative that all available sanctions for noncompliance be invoked. To that end the Secretary of State has the power to "refuse to accept for filing any rules which do not comply with this chapter"²⁹⁴ and the Legislative Rule-making Review Committee has authority to disapprove proposed rules.²⁹⁵

Both the Office of the Secretary of State and the Legislative Rule-making Review Committee can do much to bring about procedural rectitude in the rule-making process. Attorneys must be watchful for the signs of procedural irregularity in rule making in order that the attendant issues may be brought before the courts for resolution. The courts in turn should give recognition to the fact that cases concerning noncompliance with rule-making procedures often involve basic public rights as well as those of the individuals specifically involved. The courts must not hesitate, in appropriate cases, to invoke the legislatively mandated sanction of invalidity of agency rules. If each of these institutions of government and the Bar are sufficiently alert to the necessity and utility of procedural compliance, the interests of the ultimate beneficiaries, the public at large, will be served well. This will be the result even if, as may be likely, members of the public do not rise up in overwhelming numbers to exercise their new found rights to public participation and notice in rule making. The existence of the opportunity is as important as its exercise.

If the requirement of a published state register or any of the many other procedures has been unwise, impractical, or both, the solution does not lie in sanctioning noncompliance or muddling

²⁹³ The constitutional questions raised previously concerning the legislative review process are of less far-reaching application, since they are most likely to arise in the context of disapproval of a proposed rule. It is anticipated that most rules would receive legislative approval. See *generally* text accompanying notes 180-200 *supra*.

²⁹⁴ W. VA. CODE ANN. § 29A-2-1(b) (1976 Replacement Vol.).

²⁹⁵ W. VA. CODE ANN. § 29A-3-11(b) (1976 Replacement Vol.).

through at any level of government. It is not as if there were no reasonable alternative course of action. For example, in 1945, Pennsylvania enacted the Pennsylvania Register Act requiring publication of administrative rules.²⁹⁶ Immediately, opposition arose among the agencies, primarily for the reason that it was too expensive. The controversy was not settled in disregard of the legislative process, but within it. A bill to repeal the Act was introduced and, over substantial objection, was passed.²⁹⁷ Although this early experimentation with a register was rejected in Pennsylvania, today that state does have a formal codification and publication for administrative rules in the Pennsylvania Code.²⁹⁸ In West Virginia the rule-making principles represented in the 1964 Act generally and the 1976 Amendments specifically are well worth retaining and implementing. Nevertheless, repeal would be more acceptable than *ad hoc* affirmation of noncompliance founded on ill-conceived pragmatism. It is hoped and seems likely that West Virginia will not take either extreme, but will implement and enforce the basic precepts for rule making presently provided by law.

²⁹⁶ Pa. Act of June 4, 1945, P.L. 1932 (1945) (repealed 1947).

²⁹⁷ Note, *Publishing Practices of Pennsylvania Administrative Agencies*, 36 TEMP. L.Q. 551, 552 (1963).

²⁹⁸ PA. STAT. ANN. tit. 45, §§ 501-732 (Special Pamphlet 1977).

